IN THE

SUPREME COURT

OF THE UNITED STATES,

No. 302.

J. SHERMAN HALL and
WILLIAM J. POPE,
Plaintiffs in Error,

—*vs.*—

JOHN WEARE,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Emory A. Storrs,

OF COUNSEL FOR PLAINTIFFS IN ERROR.

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JOHN WEARE,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

The defendant in error was, on the first day of March, 1869, and for several years previously thereto had been the Cashier of the First National Bank of Cedar Rapids, Iowa. The plaintiffs in error then were, and for several years preceding had been partners in the grain and commission business in the City of Chicago, under the firm name of Sherman Hall & Pope.

Charles H. Hall was, during all this time, a grain dealer in Cedar Rapids, purchasing grain at that point and shipping it to his correspondents, the plaintiffs in error, at Chicago, for sale. Some time in the month of February, 1868, Charles H. Hall, who is the brother of the plaintiff in error, J. Sherman Hall, made arrangements with the defendant in error for a line of discount at his bank. He

drew on Sherman Hall & Pope from time to time, as his needs required. The drafts thus drawn were accepted by the latter purely for the accommodation of the drawer, and as the acceptances matured, Charles H. Hallwould procure discount of other drafts for the amount of such maturing acceptances, generally receiving from the bank its sight draft on Chicago, and forwarding the same to Sherman Hall & Pope in time to enable them to retire the maturing acceptances. It was claimed hy the defendant in error, on the trial, that in November, 1868, Charles H. Hall applied to the bank for an increase of his line of discount, and that he exhibited to the defendant in error a letter from Sherman Hall & Pope to him, the contents of which letter Mr. Weare attempted to give, from his recollection, under objection. According to the statement of the witness, the letter was in part as follows :

" As to your desire for us to furnish you money to en-
" able you to go into further operations in pork, &c., we
" are totally unable to do so. We have, in every sense of
" the word, all we can do to get a line of discount to
" answer our purposes. You are connected there with
" the First National Bank, and you can make arrange-
" ments with them whereby you can draw on us, and get an
" extension of your line of discount that will answer your
" purposes. We will accept, as we have done, and will
" pay." Charles H. Hall, upon the stand, denied ever having received or exhibited any such letter, and the plaintiffs in error denied ever having written it. No demand was ever made for the original letter, nor any effort made to procure it.

The defendant in error testified, that during the month of March he required Charles H. Hall to have collaterals put up satisfactory to his correspondent, the Third National Bank of Chicago, to the acceptances of the plaintiffs in error, and that during that month he went to Chicago with Hall for that purpose, but failed to see either of them.

In the meantime, on the first day of March, 1869, Charles H. Hall had drawn on the plaintiffs in error, at fifteen days after date, for $2,500 ; and on the fifth drew on them, at ten days sight, for $2,000. Both these drafts were discounted by the bank, and the proceeds sent to the plaintiffs in error to enable them to retire their acceptances, then maturing.

These two drafts were accepted, and matured on the 18th March. After their return from Chicago, and on the 16th of March, Charles H. Hall applied to the defendant in error for the discount of a draft of $5,000. Mr. Weare claims that Chas. H. Hall represented to him that he had received telegraphic advices of the acceptance of other drafts, and that collaterals had been put up as requested, and that Hall also stated that he had about 19,000 bushels of oats, and about 12,000 of corn and wheat, worth about $20,000. This $5,000 draft was discounted. Hall received a bank draft on Chicago for $4,500, which he sent by mail to the plaintiffs in error, to place them in funds to meet the acceptances of that amount, maturing on the 17th, advising them of the $5,000 draft ; that he (underscored, meaning Mr. Weare), expects collaterals to be put up to this draft, and all that you may accept hereafter ; and that the line of discount was to be from $20,000 to $25,000, and to run from four to six months.

Mr. Weare testified, that shortly after discounting the draft for $5,000 he received a telegram from Chicago that acceptance of other drafts had been refused, and that he accordingly stopped payment of his draft for $4,500. The plaintiffs in error received the draft, deposited it in their bank and upon its return to them unpaid–refused payment of their acceptances. Upon the two acceptances, maturing the 18th, this suit is brought, and the plaintiffs in error set off against their acceptances the draft of the same amount held by them.

It appeared upon the trial that while at Chicago, Charles

H. Hall negotiated a sale of his warehouse and property to one McAffee, a man of abundant means; that the bill of sale was drawn by Mr. Pope, one of the plaintiffs in error; the consideration for the sale being McAffee's notes to the amount of $12,400; these notes to be used as collaterals for the acceptances of Sherman Hall & Pope. The trade was not consummated at Chicago, and permission was given McAffee to draw on plaintiffs in error for the sum of $2,000, as guaranty for the amount of grain. The draft was drawn and paid. The sale, however, was not consummated until after the discount of the $5,000 draft, and upon the final collapse the transaction was cancelled. McAffee's notes, after having been offered to the bank and refused by it, were surrendered to him. The property was all seized by the bank, and they realized from its sale between $4,000 and $5,000.

The plaintiffs in error never, in any way, received one dollar of benefit or advantage from the discounts procured by Charles H. Hall. Their acceptances were purely for his accommodation, and upon the express agreement and understanding that he was to place them in funds to meet them at maturity. The defendant in error knew that these drafts were, in a great measure, mere renewals, intended to place Sherman Hall & Pope in funds to meet their acceptances. The whole course of the business showed this.

As tending to show the character of the agreement between Charles H. Hall and the defendant in error, with reference to the collaterals which were to be put up for acceptances, the plaintiffs in error offered and read in evidence to the jury the letter of the bank to its correspondent in Chicago, enclosing the $5,000 draft, as follows: "Messrs. Sherman Hall & Pope, and also Messrs. Sher-" man Hall & Lybrand, are to place in your hands satisfac-" tory security for this and all paper accepted by them *in* " *the future.*" The plaintiffs in error denied that they had

in any manner, ever agreed to put up collaterals for their acceptances, except such as might be furnished them by Charles H. Hall. They denied any knowledge whatever of any arrangement made by Charles H. Hall that they were to put up such collaterals. They denied any knowledge of any representations made by him on securing the discount of the $5,000 draft, and testified that they had no knowledge of any intention on his part to procure such discount. And they also testify that, but for the stoppage of the $4,500 draft forwarded to them, the draft for $5,000 would have been accepted on presentation.

It also appeared that after the refusal of the plaintiffs in error to accept the draft of $5,000, and as a part of the negotiations between the parties for a settlement, an arrangement was made between J. Sherman Hall and Mr. Walker, the President of the First National Bank, Cedar Rapids, by which the latter was to accept the draft for $4,500, in part payment of the acceptances for $9,000, the plaintiffs in error to pay the balance in cash. (Record, p. 41.) That afterwards Mr. Pope received a dispatch from Walker, saying: "I desire arrangements carried out," and that the plaintiffs in error accordingly paid $4,500 of their acceptances in cash, but the bank subsequently refused to carry out the arrangement on their part. This agreement is set forth in the pleadings. The bank brought attachment suits against Charles H. Hall on the $5,000 draft, and recovered judgment against him. (*Record*, p. 36, fol. 109). A portion of the property, seized under the attachment, was sold, and the balance, undisposed of, turned over to an assignee in bankruptcy. (*Record*, p. 28, 29.)

The trial below resulted in a verdict for the defendant in error. Motion in arrest, and for new trial were made and overruled, and there was judgment upon the verdict, from which the defendants sue out a writ of error to this court.

THE QUESTIONS INVOLVED IN THE CASE ARE:

1. Does the mere fact that the plaintiffs in error were, at the time they received the draft of $4,500 from Charles H. Hall, advised by him that Weare expected that the draft of $5,000 would be accepted and paid, and that collaterals would be deposited for the acceptance, amount to a failure of consideration of the draft of $4,500, and deprive the plaintiffs in error of any right of recovery thereon?

2. Were the plaintiffs in error holders for value of the draft of $4,500; they having received the same for the purpose of enabling them to pay an acceptance of that amount, for the accommodation of Charles H. Hall, the drawer, under an agreement that Charles H. would furnish them the means for retiring such acceptance at maturity, and said drafts having been accepted by plaintiffs in error under that agreement?

3. Does the fact, that the draft for $4,500, received by the plaintiffs in error, was drawn upon the faith and consideration of an agreement between the defendant and Charles H. Hall, that the draft of the latter, of the same date, upon the plaintiffs in error, should be accepted by them, and security given for the payment thereof, constitute, in the event of the failure to accept, secure and pay such draft, a failure of the consideration of the $4,500 draft, so as to deprive the holdersthereof of the right to a recovery thereon, merely upon showing that at the time they received such draft the plaintiffs in error had notice of such agreement, but without, also, showing that the plaintiffs in error also knew, at the time they received the draft, that there was no intention either to accept, pay, or secure the draft for $5,000?

4. It is also insisted by the plaintiffs in error that there is not in this entire record a scintilla of evidence showing or tending to show that there was any collusion or understanding whatever between the plaintiffs in error and Charles H. Hall, with reference to obtaining a discount of

the draft for $5,000, nor the slightest evidence of any understanding between Charles H. Hall and the plaintiffs in error that the five thousand dollar draft would not be accepted, nor securities put up. Nevertheless the court submitted these questions to the jury, thus practically assuming that there was evidence in the case tending to establish these facts.

5. There is not a scintilla of evidence in the case showing or tending to show that there was any complicity between the plaintiffs in error and McAffee, or Charles H. Hall, with reference to the sale of the grain at Omaha. There is no evidence in the case showing or tending to show that the sale of the grain by Charles H. Hall to McAffee was with the intention to defraud the bank, nor that the plaintiffs in error conspired with Charles H. Hall to effect such sale, with any fraudulent purpose. Yet the court submitted these questions to the jury, and in such a manner as to indicate that, in his opinion, there was evidence tending in that direction.

6. In this connection the court also assumed, as a fact, what was not proven in the case, in directing the jury to consider that the day before the draft was drawn on the plaintiffs in error for $5,000 Charles H. Hall had, in the office of the plaintiffs in error, in Chicago, made a sale of all his grain in store in Cedar Rapids to McAffee, and that there would seem to be no resourses belonging to the said Charles H. Hall with which to indemnify the plaintiffs in error for their acceptances. The undisputed evidence in the case is, that the sale was not made until *after* the discount of the draft, and that when made there were $12,400 of resources to indemnify the plaintiffs in error for their acceptances, and that the sale was made for that very purpose.

7. The court instructed the jury, that there were but *two* questions for them to consider, viz: whether the consideration of the draft had failed; and second, whether it

had been fraudulently procured by Charles H. Hall, with knowledge by the plaintiffs in error of such fraud.

Whereas, there were two other questions in the case, viz: whether the defendants in error had agreed to receive the $4,500 draft in part payment of the acceptances for $9,000; and second, whether the judgment against Charles H. Hall, on the draft for $5,000, had not been paid out of the proceeds of the property attached.

8. It is claimed by plaintiffs in error that the court erred in permitting the witness, John Weare, to testify to the contents of a certain letter, stated by him to have been addressed by the plaintiffs in error to Charles H. Hall, and by the latter exhibited to the witness. No effort was made to procure the letter.

9. The court also permitted the witness Weare to state the contents of a telegraphic dispatch which he claimed to have received on the 16th day of March, from his correspondent in Chicago. No effort was made to procure, either from the office in Chicago from which the message was sent, nor from the office at Cedar Rapids at which it was received, this dispatch.

10. The court also permitted the witness Weare to detail conversations between himself and McAffee, when neither of the plaintiffs nor Charles H. Hall were present.

11. At the commencement of the trial, the court decreed that the plaintiffs in error, the defendants below, should have the opening and the close; accordingly, the defendants below opened the case to the jury, but, at the close of the testimony, the court reversed his ruling, and, in closing the case to the jury, gave to the plaintiffs below the opening and the close.

12. The pleas contained an averment of an agreement by the defendants in error to pay the draft of $4,500. There was no replication traversing this averment, and on that ground, plaintiffs in error moved an arrest of

judgment. We claim that this motion should have been granted.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in instructing the jury as follows :

I.

" The issues are under the pleadings as follows :

First. " That the consideration for the said draft has wholly failed, of which the defendants had notice at the time they received the same, and that it is not now a valid demand against the said plaintiff in the hands of the defendants."

Second. " That the said draft was obtained from the said bank by certain fraudulent acts of the said Charles H. Hall, of which defendants were cognizant at the time they took the same, and that the said draft is void in the defendant's hands by reason of said fraud. If either of these issues are found for the plaintiff, he will be entitled to recover."

II.

" If the facts are made out by the proof to your satisfaction, that the bank drew this draft upon the faith and consideration of any agreement between the plaintiff and Charles H. Hall that the draft of the same date, on the defendants, Sherman Hall & Pope, should be accepted by said defendants, and security given for the payment thereof, and for no other consideration ; and that the said conditions have not been fulfilled, that is, if the draft on the defendants has not been secured nor paid, and that the said defendants had notice at the same time they received said draft from Charles H. Hall, of the agreement and consideration on which the same was issued, then you will be

justified in finding that the issue of failure of consideration has been made out by the proofs."

III.

"I have already told you that if you find, from the evidence, that the draft in question was obtained by Charles H. Hall from the bank, upon the faith that his five thousand draft of the same date on the defendants, was to be accepted by the defendants and secured by collaterals, and that the defendants knew of such arrangement between Charles H. Hall and the bank, at the time the draft came into their hands, and that such draft has not been so accepted or paid, then you should find the issue of failure of consideration for the plaintiff. The chief evidence, if my memory serves me right, and of this you are the judges, on this point, is the evidence of the contents of a letter from Charles H. Hall to the defendants, enclosing said draft, bearing date the sixteenth day of March, 1869.

"There is some conflict of evidence as to the exact wording of that letter, but all agree, I think, that the letter did, in plain terms, notify the defendants that he, Charles H. Hall, had that day drawn a draft for five thousand on them, and that they were expected to accept the same, and put up collaterals."

IV.

"As to how far the allusions in this letter to this draft gave the defendants knowledge of the course of dealing between Charles H. Hall and the bank, tend to show that the draft then enclosed was part of the proceeds of the five thousand dollar draft drawn on them, is for you to determine. It is also proper that you consider in this connection that, the day before this draft was made by Charles H. Hall on the defendants, said Charles H. Hall had, in the office of the defendants in Chicago, made a sale of all his grain in store in Cedar Rapids to McAffee, and that

there would seem to be no resources belonging to said Charles H. Hall, with which to indemnify the defendants for this acceptance which he made on them. You are to pass upon the pregnancy of all the facts and circumstances bearing upon the manner in which Charles H. Hall dealt with the bank, and also with the defendants, and decide, from all the evidence, on the point, whether Sherman Hall & Pope did know or had sufficient notice and information on the subject to be equivalent to actual knowledge, at the time this bank draft came into their hands and was placed to Charles H. Hall's credit, that this draft was made by the bank, upon the agreement and consideration that the defendants were to accept and secure said draft of five thousand dollars, and I believe there is no pretense that it has ever been so accepted or paid."

V.

"To recapitulate, then, the real questions at issue are, not whether the consideration of this draft has failed as against Charles H. Hall, or whether Charles H. Hall was guilty of fraud in obtaining it, but whether the defendants, at the time they took the draft from Charles H. Hall, knew the facts out of which the draft originated, to such an extent as to vitiate it in their hands, were they parties to Charles H. Hall's fraud, or did they know of his agreement, that they should accept and secure his draft, and that the draft in question was part of the proceeds of his draft; or had they such knowledge of the circumstances out of which the draft originated, that they must be reasonably supposed to have understood the whole of the matter? If this knowledge is not brought home to them, even if the fraud or failure of consideration, so far as Charles H. Hall is concerned, is fully proven, yet the plaintiff has not yet made out a case. While, on the contrary, if the proof, or a preponderance of the proof satisfies you that the defendants did know that the consideration of the contract in question

was an agreement that the defendants should accept and secure and pay the five thousand dollar draft of Charles H. Hall, and that the defendants have refused to accept, secure or pay, then the plaintiff will be entitled to a verdict at your hands on the issue of failure of consideration."

VI.

" And if you find, from the evidence, that this draft was obtained by Charles H. Hall from the plaintiff by false and fraudulent representations, that certain other drafts had been accepted by defendants, and secured by collaterals, and also, after the amount of grain he, the said Charles H. Hall, then had in store at Cedar Rapids, had been sold and disposed of by him, and that the said defendants knew at the time they received said draft that the said draft had been so fraudulently obtained, or if you shall believe from the evidence, that said draft was thus fraudulently obtained by Charles H. Hall from the plaintiff in pursuance of a collusive and fraudulent conspiracy between the defendants and Charles H. Hall, with the express or implied understanding that the said five thousand dollar draft was not to be accepted, secured, nor paid, or as a part of the conspiracy between said Charles H. Hall and defendants, by which all the available property of said Charles H. Hall was to be transferred directly or indirectly to the defendants, for the purpose of defrauding the plaintiff, and his bank, then you will be authorized in finding the issues of fraud for the plaintiff."

VII.

" So as to the other issue, that the said draft was obtained from the said bank by the fraudulent acts of the said Charles H. Hall, and that said defendants had knowledge of the said fraud at the time the draft came into their hands; that is, if you shall find, from the evidence in the case, that there was an understanding or collusion between

Charles H. Hall and the defendants, that Charles H. Hall should obtain said draft from the bank upon the faith and representation that the five thousand dollar draft of said Charles H. Hall on the defendants, of the same date, would be duly accepted, and collaterals put up to secure its payment, and that at the same time, it was well understood between said Charles H. Hall and the defendants that said five thousand dollars would not be accepted, nor securities put up, then you will be justified in finding that issue for the plaintiff."

VIII.

" In examining into the question whether the allegations of fraud have been made out by the proofs, you will carefully consider the relations existing between Charles H. Hall and the defendants; the fact that he is a brother of one of the defendants; that he was largely indebted, not only to the present defendants, but also upon an old account in favor of the old firm of Sherman Hall & Pope; and you have the right to consider, not as conclusive, but as a simple circumstance in the case, from your knowledge of human nature, whether he would not prefer that the losses of his business, if any, should fall rather upon the bank than upon his brother or his firm. You should also weigh well, and carefully consider how far the transaction between Charles H Hall and the defendants and McAffee, here in Chicago, in the preparation of the bill of sale to McAffee of all his, Charles H. Hall's grain, with the guaranty by the defendants of the amount and value of that grain, (and as the guaranty is testified to by Charles H. Hall, and not contradicted by any other witness, I assume that you will consider it proven, although that is for you to pass upon), and the manner in which said Charles H. Hall and McAffee acted with the bank after this transaction, by concealing the same with the plaintiff, or at least withholding information thereof from him on

the subject at the time this draft in question was obtained, although it would seem to have been information to which the bank or its officers were entitled, as it related particularly to the question of Charles H. Hall's ability to meet the draft he was then drawing—I say you are to say how far the circumstances prove or tend to prove the allegations of fraud made by the plaintiff, and with which they claim to defeat the bill in question."

IX.

"So with the attempt on the part of Charles H. Hall to sell the Omaha grain; his leaving Chicago suddenly and secretly, so far as Mr. Weare was concerned, and his leaving Cedar Rapids on a freight train at night, when it did not seem to have accelerated his arrival at his place of destination; his sale of grain, which he says in his testimony was worth from thirty-five hundred to four thousand dollars, for fifteen hundred dollars, on a time contract; it is for you to say, I say, whether there is any testimony to show, or tend to show, that these defendants knew anything of this effort of Charles H. Hall, and whether it was part of a conspiracy and collusion between Charles H. Hall and the defendants, by which Charles H. Hall's property was to be directly or indirectly transferred to the defendants to defraud the bank."

X.

"Much stress is laid by defendants' counsel upon the date of the protest of certain drafts. I think there is no dispute as to the fact that these drafts were not formally protested for non acceptance until the eighteenth of March. But it is contended by the plaintiff, that they were, in fact, presented for acceptance, and acceptance refused, on the sixteenth. I simply deem it my duty to say to you that the date of the protest is not of itself conclusive evidence that the demand for acceptance had not been made until

that day. It may have been presented, and acceptance refused, at an earlier day, and the protest have been delayed. The evidence as to whether the drafts of the eleventh and twelfth of March were actually presented for acceptance, and acceptance refused, on the sixteenth or eighteenth of March, is a disputed point, which it is for you to pass upon, and not for the Court."

XI.

The Court below erred in permitting the witness, John Weare, to state, from his recollection, the contents of a certain letter, stated by the witness to have been written to Charles H. Hall by the plaintiff in error, and exhibited to the witness by Charles H. Hall, and in overruling the objection of the counsel for plaintiff in error. The contents of said letter, as testified to by the witness, being as follows: "As to your desire for us to furnish you money to "enable you to go into further operations in pork, etc., "we are totally unable to do so. We have, in every "sense of the word, all we can do to get a line of discount "to answer our purposes. You are connected there with "the First National Bank, and you can make an arrange- "ment with them whereby you can draw on us and get "an extension of your line of discount that will answer "your purposes. We will accept as we have done, and "will pay." (*Record*, p. 30, fols. 93, 94.)

XII.

The Court below erred in permitting the witness, John Weare, to testify to the following conversation between himself and Charles H. Hall, and in overruling the objections of the counsel for plaintiff in error thereto:

"March 16, when I came to the bank in the afternoon, "the assistant cashier, Mr. Dean, handed me Charles H. "Hall's bank book, with a $5,000 draft on Sherman Hall "& Pope, for discount. Hall came in, and said, 'I want

" that draft discounted.' Talked about going to Chicago, " and that I had yet to learn that collateral security had " been put to the drafts he had drawn and was to draw. " He said, 'That has been done. I fixed that up before I " left, and the whole batch has been accepted.' That he " told his brother to telegraph him when it was done, so " he might come in and make me satisfied, and he had a " telegram from his brother, saying that the whole $13,000 " had been accepted, and the collaterals put up. This " was along two or three o'clock, P. M. I then asked " Hall how much grain he had. He said, about 19,000 " bushels of oats, and about 12,000 of corn and wheat, " each, making in all, he thought, about $20,000 to $21,000, " he had." (*Record*, page 31, folio 97.)

XIII.

The Court erred in permitting the witness, John Weare, to state the contents of a telegraphic despatch, alleged to have been received by him, about four o'clock, P. M., March 16, from the Third National Bank, Chicago, and in overruling the objections of the counsel for plaintiff in error thereto. The contents of said telegram being stated by the witness as follows: " The telegram stated that " the drafts of Charles H. Hall on Sherman Hall & Pope " were protested."

XIV.

The Court erred in permitting the witness, John Weare, to testify to the following conversation between himself and McAffee, and in overruling the objections of the plaintiff's counsel thereto:

Question. " Did you have any conversation with Mc- " Affee on the 18th day of March, as to how much he " had paid and what amount of notes he had given Charles " H. Hall for this property?"

Answer. " I guess the 21st of March I saw McAffee.

"He had taken possession of the warehouse. Hall was "not present when I had this conversation. I asked, "'Have you purchased this grain?' 'I have,' said he. "I said, 'What did you give for it; how came you to pur- "chase it?' He said, 'I was urged to buy it by Sherman "Hall & Pope, and Charles Hall, and I thought there "was some money in it, and like all the world, I bought "it. I wanted to make some money. If you will give "me $2,000, I will give it up.' I asked him what he paid. "He was in doubt in regard to it. Said he paid $2,000 "in money, and had provided satisfactorily to Sherman "Hall and Pope and Charles Hall, for the balance."

Question. "Did you ever hear McAffee make any "statement, subsequent to that, whether he received the "$2,000?"

Answer. "A day or two after the grain was attached, "he said to me that he had got me into that matter; "didn't understand it just at the time, but that he was not "out of pocket any; that he had made Sherman Hall & "Pope refund to him the money which he had paid, and "the notes had been returned, so that he was just where "he begun." (*Record*, pp. 33, 34.)

XV.

The court erred, in giving to the defendant in error the opening and close of the argument to the jury — thus changing his ruling when the trial began, under which the plaintiffs in error were permitted to open the case to the jury. (*Record*, p. 48.)

XVI.

The court erred in overruling the motion of the plaintiff in error, to arrest the judgment upon the pleas of the plaintiff in error for want of a replication traversing an allegation therein of a promise to pay the said draft, so

drawn by the said First National Bank, of Cedar Rapids, to said Charles H. Hall, for $4,500.

XVII.

The court erred in overruling the motion for new trial.

XVIII.

The court erred in excluding from the jury, consideration of the facts of the agreement for settlement of the draft sued upon, and also the consideration of the fact that judgment had been recovered against Charles H. Hall upon the draft [redacted], and property sold thereon.

ARGUMENT.

FIRST.—WERE THE PLAINTIFFS IN ERROR HOLDERS OF THE DRAFT FOR $4,500.00, DRAWN BY THE FIRST NATIONAL BANK OF CEDAR RAPIDS, UPON ITS CORRESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, AND FORWARDED TO THEM BY CHARLES H. HALL, FOR VALUE ?

Charles H. Hall, during the years 1868 and 1869, drew time drafts upon the plaintiffs in error, which were, by them, accepted for his accommodation. The plaintiffs in error received no consideration or benefit from any of them, and those drafts were accepted with the understanding that Charles H. Hall should protect them; that he would either remit the money or ship grain to pay the drafts. (*Record*, page 38, folio 115.) On the 17th day of March, 1869, two drafts drawn by Charles H. Hall on the plaintiffs in error, and accepted by them, matured. It had been the custom of Charles H. Hall in a great number of instances before that time, to effect a new discount for the amount of the maturing acceptances the day pre-

ceding their maturity; to receive the sight draft of the defendant in error, and to forward it to the plaintiffs in error in time to enable them to retire the maturing acceptances. (*Record*, page 44, folio 133.) Of this custom the defendant in error was fully cognizant, and preferred that the drafts received by Charles H. Hall on such renewals should be thus applied. At the time the draft for $5,000.00, drawn by Charles H. Hall on the plaintiff in error, was discounted, on the 16th of March, 1869, the defendant in error knew that Charles H. Hall drew his check for $4,500.00, and received a draft on Chicago for that amount; that he knew that $4,500.00 of acceptances matured the next day, and supposed that Charles H. Hall procured such draft for the purpose of sending it to Sherman Hall & Pope, in order to enable them to retire such acceptances. (*Record*, page 48, folio 142.) Charles H. Hall testifies that he repeatedly told the defendant in error the purposes for which he procured drafts from them, and that, on the 16th of March, he told Weare that he wanted the money to send to Sherman Hall & Pope, to pay acceptances due the next day, and that Weare turned to his book and ascertained that $4,500.00 was to mature the 17th; that, after receiving the $4,500.00 draft, he enclosed it to the plaintiffs in error, for the purpose of retiring such acceptances. (*Record*, page 45, folio 134.)

J. Sherman Hall testifies that his brother applied to his firm desiring to draw time drafts on them under the agreement that he should provide for their payment at maturity; that they were entirely for his accommodation; that all the drafts thus received were applied to the payment of acceptances; were never used for any other purpose; that they never derived any benefit from them, or received any consideration for such acceptances in any way, and that they never applied the proceeds of sales of property shipped to them by Charles H. Hall to any other purpose than the payment of the drafts accepted by them for his accommo-

dation. (*Record*, page 42, folios 125 and 126.) These facts are undisputed and indisputable, and, as we insist, clearly show that the plaintiffs in error received and held the $4,500.00 draft for value.

Under this agreement, Charles H. Hall was bound to furnish the plaintiffs in error with funds, for retiring the drafts maturing on the 17th. Under that agreement, the plaintiffs in error accepted those drafts. One agreement was a good and valuable consideration for the other. The plaintiffs in error had executed their agreement by accepting the drafts. Charles H. Hall undertook to perform his by forwarding them the funds to pay the draft. The rule is thus stated in Byles on Bills, page 228: "If a man gives "his acceptance to another, that will be a good considera- "tion for a promise, or for another bill or acceptance, "though such first acceptance is, after all, unpaid." Citing *Rose* v. *Sims*, 1 B. and Ad., 521.

The general duty of the drawer of a bill accepted for his accommodation is thus stated by the same writer, page 238: "A party who procures another to lend his accep- "tance, thereby engages himself to take up the bill, or "else, within a reasonable time before the bill becomes "due, to provide the accommodation acceptor with funds "for so doing, or, lastly, to indemnify the accommodation "acceptor against the consequences of non-payment."

The case of *Yates* v. *Hoppe*, 9 C. B., 541, forcibly illustrates this rule. In that case the drawer of a bill, accepted for his accommodation, a week before the bill became due, handed over to his accommodation acceptor bank notes to retire the acceptance. It was held that this was a transfer for value; that the drawer had no right to revoke this payment, and that, accordingly, the bankruptcy of the drawer, before the maturity of the bill, did not amount to a revocation. In *Williams* v. *Smith*, 2 Hill, 301, the Court held that, "one to whom a promissory note has been trans- "ferred before due, as collateral security for endorsements,

"to be made for him, which are afterwards made, and "who takes without notice of a defence existing against it, "in the hands of the person from whom he received it, is "entitled to be treated as a *bona fide* holder in the com- "mercial sense."

So, too, fluctuating balances in the hands of a banker may be a consideration for a bill. Where a banker's acceptances, for his customer, exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker, as a collateral security, it was held that whenever the acceptances exceeded the cash balance, the banker held the collateral bill for value. Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bill. (Byles on Bills, 230, 1, 2, 3, and Notes.) See also 1 Parsons on Notes and Bills, 199; 8 Conn. 505; *Grant* v. *Kidwell*, 30 Mis. (9 Jones), 455; *Bosanquet* v. *Dudman*, 1 Starkey, 1; *Swift* v. *Tyson*, 16 Peters, 23, 24; *Dowe* v. *Shutt*, 2 Denio, 621.

SECOND.—DID KNOWLEDGE, BY THE PLAINTIFFS IN ERROR AT THE TIME THEY RECEIVED THE $4,500.00 DRAFT, OF THE FACT THAT CHARLES H. HALL DID, AT THE TIME HE RECEIVED SUCH DRAFT, AGREE THAT THE PLAINTIFFS IN ERROR SHOULD, UPON ITS PRESENTATION, ACCEPT AND SECURE THE $5,000.00 DRAFT, AND PAY THE SAME AT MATURITY, CONSTITUTE SUCH A FAILURE OF CONSIDERATION AS TO DEPRIVE THE PLAINTIFFS IN ERROR OF THE RIGHT OF RECOVERY UPON THE $4,500.00 DRAFT?

This question must be considered and discussed upon the assumption, that the plaintiffs in error received the draft in good faith, and were the holders thereof in good faith. The Circuit Judge, before whom this case was tried, in his charge to the jury, evidently apprehending that the evidence of fraud was too slight to justify a verdict, was

at very great pains to separate the question of fraud from the question of failure of consideration. At the very outset of his charge, he tells the jury that there are but two issues under the pleadings: " first, that the consideration for the said draft has wholly " failed, of which the defendants had notice at the time they " received the same ; and second, that the said draft was " obtained from the said bank by certain fraudulent acts " of the said Charles H. Hall, of which defendants were " cognizant at the time they took the same."

The point, as to failure of consideration, and the facts which would, in the opinion of the court, constitute it, were in the charge kept most prominently before the jury. Thus, at the very outset, the jury are told, that if the facts are made out by the proofs to their satisfaction, that the bank drew this draft " upon the faith and consideration of an " agreement between the plaintiff and Charles H. Hall, " that the draft of Charles H. Hall, of the same date, on " the defendants, Sherman Hall & Pope, should be ac- " cepted by said defendants, and security given for the " payment thereof, and for no other consideration, and that " the said considerations have not been fulfilled, * * " * * * * * * " and that the said defendants had notice, at the time they " received said draft from the said Charles H. Hall, of the " agreement and consideration on which the same was " issued," then they would be satisfied in finding that the issue of failure of consideration had been made out by the proofs. (Record, page 49, folio 445.)

Again, the court (Record, page 50, folio 149), tells the jury, that if they find from the evidence, " that the draft in " question was obtained by Charles H. Hall from the bank " upon the faith that his $5,000.00 draft, of the same date, " on the defendants was to be accepted by the defendants " and secured by collaterals, and that the defendants knew " of such arrangement between Charles H. Hall and the

" bank at the time the draft came into their hands, and " that such draft has not been so accepted or paid, then " you should find the issue of failure of consideration for " the plaintiff."

In order effectually to clinch this portion of the charge, and to put it in such shape that there should be no misunderstanding of it, or escape from it, the court refers to the letter of Charles H. Hall to the plaintiffs in error, enclosing the $4,500.00 draft as evidence of notice, saying in this connection, " there is some conflict of evidence as to " the exact wording of that letter ; but all agree, I think, " that the letter did in plain terms, notify the defendants " that he, Charles H. Hall, had that day drawn a draft up- " on them for $5,000.00, and that they were expected to " accept the same, and put up collaterals." Thus, after for the second time telling the jury, that if they found from the evidence, that Charles H. Hall, did agree that the $5,000 draft drawn by him, would be accepted and paid by the plaintiffs in error, and that the plaintiffs had notice of such agreement that this would amount to a failure of consideration, the court tells them that it is agreed on all hands, that they did have such notice.

The other missing link, that is, as to whether the $5,000.00 draft was actually accepted and paid, the court proceeds at once to supply ; for he again tells the jury that from all the circumstances, they are to determine whether the plaintiffs in error had such notice ; and then adds : " I " believe that there is no pretense that it has ever been so " accepted or paid." (*Record*, page 51, folio 151).

But even this was not enough ; for the court again (at page 52, folio 155 of the *Record*) tells the jury that if " the " proof or a preponderance of the proof satisfies you, that " the defendants did know that the consideration of the " contract in question was the agreement that the defendants " should accept, and secure, and pay the $5,000.00 draft of " Charles H. Hall, and that the defendants have refused to

" accept, secure, or pay, then the plaintiff will be entitled " to a verdict at your hands, on the issue of failure of con- " sideration." Throughout the entire charge, the court was most careful to separate these two questions ; namely, the failure of consideration, and the question of fraud ; and immediately following that portion of the charge last quoted, the jury are instructed as to the facts which will justify them in finding the issue of fraud in favor of the plaintiffs below, and in order that the jury might not become confused, and themselves unwittingly mix these questions, the court in conclusion, tells them " you may " find one or both, these issues for the plaintiff, if you " shall consider the proof sufficient ; *but either will be suffi-* " *cient to entitle the plaintiff to a verdict on the draft de-* " *clared on.*" The court having already told the jury that as to the issue of failure of consideration, the proof of notice and of failure to accept and pay, was not only sufficient, but was undisputed, the labors of the jury were thereby greatly lightened, and they did the only thing they could have done under the instructions, render a verdict for the plaintiff.

It is important at the very outset, to observe that the plaintiffs' right to a recovery on the ground of failure of consideration, was not made to depend in the slightest degree, on any intention on the part of Sherman Hall & Pope, not to accept and pay the $5,000 draft, nor upon any understanding between them and Charles H. Hall, that it should not be accepted and paid, nor indeed upon any intention or expectation upon the part of Charles H. Hall, at the time he drew the same, that it would not be regularly accepted upon presentation, and paid at maturity. These considerations are all carefully excluded from the jury, so far as their finding upon the point of failure of consideration was concerned, and only brought to their attention as elements which would enter into the question of fraud. The proposition as laid down by the court, four

times, was simply this: that if the jury believed that at the time the plaintiffs in error received from Charles H. Hall the draft for $4,500, they had notice of his *agreement*, that the draft of $5,000 should be accepted and paid by them, they were to find the issue of failure of consideration in favor of the plaintiff below. Thus all questions of fraud were eliminated from this branch of the case, and the jury instructed to render a verdict for the plaintiff, even though they believed Sherman Hall & Pope to have received the $4,500 draft in good faith, and for value, provided they should also believe that they had notice of the mere *agreement* of Charles H. Hall, that they should accept and pay the draft for $5,000.

The charge as quoted, as I insist, directs the jury to find against them; even as such *bona fide* holders, for *value*, for, so far as the charge upon this point is concerned, nothing is stated upon it which would impeach the good faith of the defendants' title; and herein, I inquire:

1. *Were the defendants, under the facts stated by the court, holders, in good faith, of the* $4,500 *draft?*

For the purposes of the argument, I assume that the defendants, when they received the draft, had actual notice of the consideration upon which the plaintiffs allege that it was based; yet such notice would not impair their title, unless the consideration were an illegal or corrupt one. No such claim is made. The agreement, on the part of Charles H. Hall, that the payees would accept and pay was not only a proper one in this particular case, but it is precisely the agreement which by the draft itself, every drawer always makes. Charles H. Hall's agreement, that the defendants should put up collaterals, to secure the payment, was an altogether legitimate one. The defendants then had notice that the consideration for the draft was, in every respect, a valid, legal and proper one; that it was, in fact, the consideration upon which all drafts are based; that it grew out of an agreement by the

drawer, not only usual, but universal in such transactions; and yet, the jury are told that notice of a valid consideration invalidates the title of commercial paper in the hands of the holder having such notice, and that knowledge of an entirely proper, nay indispensable, agreement between the original parties to commercial paper, destroys the rights of an otherwise innocent holder of such paper for value.

It is too clear to admit of argument that knowledge of such an *agreement*, as the court points out in the charge, does not make out a case of bad faith against the plaintiffs in error. The fact that they did not accept and pay, is no evidence of bad faith upon their part. The court did not leave it to the jury to find whether *they had ever agreed thus to accept and pay*; and if they had never agreed to do so, there could be no bad faith in their refusing to do what they were under no obligation to do.

The defendants did not, at the time they received the $4,500 draft, have notice that they had not accepted, and paid the draft for $5,000. They had notice only of the agreement, made by the drawer, that they would *thereafter* accept and pay. The court is careful not to tell the jury that, in order to find for the plaintiffs on this issue, they must find that the defendants, not only had notice of the agreement, under which the $4,500 draft was obtained, but that the agreement had not been performed, and that there was no intention to perform it. Knowledge of the latter fact, would have constituted a defense available to the bank, not on the ground of failure of consideration, but of fraud.

But as the charge stands, the defendants' rights, as holders of the draft, were destroyed, and the jury were bound to find against them; even though Charles H. Hall, at the time he made the agreement, honestly supposed it would be carried out, and the defendants themselves, when they

received the draft, fully intended to accept, secure and pay the one drawn upon them for five thousand dollars.

That the defendants would, under such circumstances, be *bona fide* holders of the $4,500 draft, admits of no doubt.

Suppose that in consideration of the discount of the $5,000 draft, Charles H. Hall had agreed to convey certain property to the bank — that the defendants knew, at the time they received the $4,500 bill, of the agreement, and that subsequently the drawer failed, and refused to make the conveyance, could it be contended for a moment that the holders would be, in the slightest degree, affected by such notice? Suppose that the $5,000 draft had been drawn on some other persons than the defendants, but with precisely the same agreement as to acceptance, security and payment, as is alleged in the present case; under what principle of law or business fairness, would the defendants' title to the $4,500 draft, be impaired, merely by showing that they had knowledge of suc . *agreement*, and without going further and showing that they also had notice that the agreement was fraudulently made, and without any intention or possibility of performance?

The case is in no wise changed because it was the agreement that the defendants should *themselves* accept, secure and pay. When they received their draft, they had notice of nothing more; and the difficulty with the charge is, that it holds that they need have notice of nothing more. In short, the law is thus declared. That the holder of commercial paper for value, receiving it with notice of an agreement between the original parties to it, as its consideration—which agreement, the party making it honestly intended to perform—will have no right of recovery upon such paper, provided the original party should *afterwards* for any cause fail to perform his agreement.

Suppose that the consideration, for this $4,500 draft, had been Charles H. Hall's note, payable to the bank, and at the time of receiving the draft, the defendants knew

that such was its consideration, the *subsequent* failure of Chas. H. Hall to pay his note at maturity would cut no figure in the case. Carry the supposition still further. Suppose that the defendants had been indorsers upon such note, or had guaranteed its prompt payment at maturity, the bank would still have been holden to them on its draft, and they to the bank on their guaranty.

The only equities existing between the original parties to commercial paper, by which an indorsee or transferee for value is affected, are those which exist *at the time* he receives the paper. Such holder is in no way affected by any equities *subsequently* arising, even though he have the fullest and completest knowledge of them. Thus it is said in 1 Parsons on Notes and Bills, p. 261 : " Knowledge, " on the part of the holder, at the time he took the note, " that it was not to be paid on a specified contingency, is " not sufficient to defeat his right to recover, although the " contingency had then happened, if he was ignorant of " this fact." Cases cited : *Adams* v. *Smith*, 35 Maine, 324; *Ferdon* v. *Jones*, 2 E. D. Smith, 106; *Davis* v. *McCreadey*, 4 E. D. Smith, 565.

But it must be remembered that the defence made to the payment of the $4,500 draft is not a want of consideration, but a FAILURE of consideration. The rights of the holder of commercial paper can be affected by equities, or a defence in favor of the original party, only in case he takes the same with notice of such *defence*. The defence set up to this draft is a failure of consideration, and the rights of the defendant can be impaired only by showing that they had notice of it at the time the draft came into their hands.

This branch of the defence is not that Charles H. Hall agreed that the defendants would accept, secure and pay the $5,000, but in their *failure* thus to accept and pay. If the defendants did not have notice of this failure when they received the $4,500 draft, *then they did not have notice*

of the defence, and cannot be affected by it; and that they did have notice of such a defence when the draft came into their hands, is not even pretended, and would have been impossible from the very nature of things.

Moreover, the charge of the Court is clearly erroneous in this particular. The jury are not told that they must find that the defendants had notice of the failure of the consideration, but they are simply instructed that the consideration consisted in Charles H. Hall's *agreement;* that the defendants cannot recover on the draft, if they had notice of *such agreement*, provided it was not afterwards performed; and the result is that the defendants' title is made to depend, not on their knowledge of a *failure* of the consideration, but simply on their knowledge of what the consideration was; not on their knowledge of any defence existing at the time the draft came to their hands, but on the fact that *subsequently* a defence came into existence.

The Court in its charge divided the case into two branches: 1. The question of failure of consideration; and 2. The question of fraud. They are entirely separate and distinct in their character, and under the charge, as it now stands, the jury were bound to find against the defendants, without the slightest reference to the question of fraud. As I have already remarked, their mere knowledge of the consideration of the draft defeated their rights, even though they might have then supposed that the $5,000 draft would have been accepted, secured and paid.

In *Davis* v. *McCreadey*, 4 E. D. Smith, 565, the Court held that "a third person, taking a bill or note before "maturity, for value, *with knowledge of the original con-* "*sideration, but without notice of any failure thereof, is en-* "*titled to recover.*"

In that case, it was proved that the plaintiff took the bill with knowledge that it was originally drawn by Mes-

more, accepted by the defendants, and delivered to Barnabas Baker, the payee, in part payment for the purchase money of the brig "Ohio," sold by his firm to I. and B. Baker, to them jointly, and that at the time of such purchase and delivery of the bill, it was agreed between I. and B. Baker, on the one hand, and Mesmore and the defendants on the other, that the brig should be repaired by the vendors, and rendered by them, tight, staunch, strong and perfectly seaworthy. This agreement was not performed. Upon this state of facts, the Court say :

"In *Ramsey* v. *Leek*, 5 Wend., 20, the defence of want "of consideration was admitted in an action brought by a "holder of a note, who held it for a valuable consideration, "upon the ground that he knew of the *defence* when he "took the note. This I understand to be the distinction "which governs these cases. *The inquiry is not whether* "*the party taking the bill knew that the same was given by* "*the maker in connection with a covenant he had entered* "*into to do something else for the maker, but whether he* "*knew at the time of taking the bill that there was a defence* "THEN *existing to the payment of it.* No such fact is "proven in this case. The only evidence is that one of "the plaintiffs knew that the consideration of the bill was "for the sale of a vessel, which the vendors had agreed "to repair, so as to make her seaworthy. I have no "hesitation in saying that this is not enough to admit, as "a defence to the bill, either in whole or in part, that upon "that contract, the vendors failed to make the vessel sea-"worthy. * * * * * But this defence arose *after* "*the bill was given.* It did not form a defence at the "time of its execution. No damages could be recouped "against the plaintiffs; and as they had paid value for the "bill without knowledge of the existence of any defence "thereto, *at the time it was passed to the payees*, the plain-"tiffs are entitled to recover."

In *Elwell* v. *Dodge*, 33 Barbour, (N. Y.) 343, the Court say : " The indorsee of negotiable paper does not take it " subject to equities that may thereafter arise between the " payee and maker, *but only to such as exist at the time of* " *the transfer*."

In *Adams* v. *Smith*, 35 Maine, 324, the payee of the note sued upon had entered into a stipulation with the maker, that, in case of a loss to certain property insured, the note was not to be paid, but that its amount was simply to be deducted from the amount of the loss. The plaintiff, who was the holder of the note for value, and to whom it had been transferred before its maturity, had a knowledge of this stipulation. The loss occurred before the maturity of the note, but it was held, nevertheless, that the plaintiff was entitled to recover, on the ground that, *at the time he received the note, it did not appear that he had notice that the loss had happened.*

In *Ferdon* v. *Jones*, 2 E. D. Smith, 106, it was held : " Where a note is given by the maker to the payee in re- " liance upon a promise by the latter, to deliver stock for " it at a future day, and the payee passes the note before " its maturity to a third person, either to pay a precedent " debtor for a contemporaneous consideration; the note " may be recovered from the maker, although the person to " whom it has been transferred had notice before he received " it that it was originally given on the promise to deliver " stock, and that such promise remained, at the time, " unfulfilled."

See also upon the same point :

Campbell v. *Rush*, 9 Iowa, 337.
Varnum v. *Bellamy*, 4, McLean, 87.
Mickles v. *Colvin*, 4, Barbour, 304.
Houghtailing v. *Runden*, 25, Barbour, 21.
Chapman v. *Eddy*, 13 Vermont, 205.

As to the *facts* to which these authorities apply, there is, fortunately, in this case, no controversy.

The draft for $5,000 was discounted on the 16th day of March. It left Cedar Rapids on the morning of the 17th, and was presented for acceptance on the morning of the 18th. As to this particular draft, there is no controversy, and it is not pretended that it was presented before the 18th.

The draft for $4,500 was received by the defendants on the morning of the 17th. In order to get it into the hands of the defendants in time to enable them to use it for the purpose of retiring their acceptances maturing that day, Charles H. Hall took it to the train which passed Cedar Rapids about three o'clock, and mailed it on the train, so that it reached the defendants on the morning of the 17th. Accordingly, at the time the defendants received this draft there had been no failure of consideration; there was, then, no prospect or expectation of any such failure, and not until the *next day* was the draft presented, or any possibility existing for such failure.

It is simply impossible, then, to talk of the defendants' having notice of the failure of consideration at the time they received the draft for $4,500; nor does the charge of the court, as I have already observed, make this necessary, nor does it leave the jury to find whether there was any collusion or understanding between the defendants and Charles H. Hall, that the five thousand dollar draft was not to be accepted or paid. This would have been, as I have said, material only on the question of fraud, but the only proof on the point is, that it was the intention of all the parties to the transaction to accept, secure, and pay the $5,000 draft, and that it would have been done but for the stoppage of the $4,500 draft.

But there is still another view in which the charge is erroneous.

I insist that, so far as the mere quieston of failure of consideration is concerned, the bank would be liable upon the draft in question, even in the hands of Charles H. Hall. It is not a correct statement of the case that the sole consideration of the draft of $4,500 was Charles H. Hall's agreement that the defendants would accept, secure, and pay the draft for $5,000.

The whole case was merely one of an exchange of drafts, and each draft was the consideration for the other. Charles H. Hall exchanged his draft on the defendants for $5,000 for the plaintiffs' draft on the Third National Bank of Chicago for $4,500.

Hall agreed that the drawees in his draft should accept, secure, and pay it, and Weare agreed that the drawee in his draft would pay upon presentation. One agreement is just as, and no more, binding than the other. No conditions, even as between the original parties, were annexed to either agreement. There was no understanding expressed or implied that the payment of the $4,500 draft was conditioned upon the acceptance of the $5,000 draft, nor was there any understanding that the acceptance of the draft for $5,000 depended upon the payment of the one for $4,500. At all events, if there were any such implied conditions, they applied as well to one draft as the other, and, had suit been brought against Charles H. Hall, as the drawer of the $5,000 draft, it is very certain that he could, had he retained the draft for $4,500, have set it off against the one drawn by himself.

The consideration for the draft held by the defendants was the *draft* drawn on them by Charles H. Hall. The failure to realize on the latter draft is not a *failure of consideration, but simply a failure to receive* the benefits which they expected to derive from it. The *consideration has not failed, because the draft still exists, and is just as valid, just*

as binding upon the parties to it as it has ever been. There is nothing original in this view of the case. The principle is elementary, and is thus stated by Mr. Parsons, in his treatise on Notes and Bills, page 203: "We must, "(he says,) however, discriminate between a failure of "consideration, *and a failure of benefit resulting from it.* "A promises B to do a certain thing, and B makes his "note to A in consideration of this promise, then A fails "entirely to perform his promise, but sues B on his note. "If B retains A's promise, or if the contract is such that A "is always and permanently held on his promise, B can- "not defend against the note, on the ground of a failure of "consideration."

Again, at page 200, he says:

"Generally, if a note be given for a promise or a con- "tract of which performance can be enforced, *a refusal to* "*perform it is no defense to an action on the note.* The "defendant's remedy is by compelling performance of "the promise for which the note was given."

See also

Spiller v. *Westlake*, 2, B. and Ad., 155.
Trask v. *Vinson*, 20 Pick., 105.
Moggridge v. *Jones*, 14 East., 486.

Charles H. Hall is still liable as drawer upon the $5,000 draft. His agreement that the defendants would accept and pay it, is as complete and binding as ever. The agreement sworn to by Weare, is nothing more than the legal agreement which he assumed when he drew the draft, for, by the draft itself, he agreed that the drawees should accept and pay it, and that in case they did not do so he would. This promise the plaintiff still retains. Charles H. Hall is always and permanently held upon it; this promise formed the consideration for the $4,500 draft; the promise has not failed, but still subsists although it is un-

performed, and the case is thus brought directly within the doctrine laid down by Mr. Parsons. The failure to perform a promise, must not be confounded with the failure of the promise itself, and where one note is the consideration for another, the *consideration* has not failed, just, so long as the note exists, and the liability of the maker of it continues. The failure to pay a note is not a failure of the note, and in this case, to again quote the language of Judge PARSONS, " the defendant's remedy is by compelling per-" formance of the promise for which the note was given."

Under the rule as laid down by the court in this case, the plaintiff may, as he has done, sue Charles H. Hall, recover and collect judgment against him for the amount of the draft of $5,000, and escape payment of the draft of $4,500, and thus the plaintiff would get $5,000 *without any consideration whatever.*

But these conclusions can be pushed still further. Even had the defendants absolutely agreed to accept, secure and pay the draft for $5,000, the plaintiff would still have been liable to them upon the $4,500 draft, and the plaintiff would have been driven to his remedy upon the agreement to accept.

Still another objection to that portion of the charge under discussion, is the fact that in calling the attention of the jury to the notice embodied in the letter to the defendants of the 16th of March, enclosing the draft in controversy, no allusion whatever is made to that portion of that letter, advising the defendants of the arrangements which Charles H. Hall had made with the plaintiff as to future operations. After advising the defendants that he enclosed bank draft for $4,500, that he had drawn upon them for $5,000 at fifteen days, that Weare insists that the talk had in Chicago be carried out, and that " *he* expects " collaterals to be put up for this draft and for all drafts

" which you may *accept hereafter*," he adds in conclusion: " he understands the line of discount to be from $20,000 " to $25,000, to run four to six months." Thus assured, the defendants might feel entirely safe in accepting the draft for $5,000, for with a line of discount of $25,000, continuing from four to six months, the same system of renewals that had previously been pursued, would be continued. This letter demonstrates that it was the *intention* of all the parties to accept and pay the draft for five thousand dollars, and in order to assure the defendants that they might do this with entire safety, they are assured that this line of discount had been agreed upon. If it was not Charles H. Hall's intention that the draft for $5,000 should be accepted, why would he write to the defendants, that arrangements had been made for this line of discount, and advise them of the length of time it was to run. For, most assuredly, so soon as one of the drafts went to protest for non-acceptance, the line of discount would be at once terminated, and all the parties understood this perfectly well.

The balance of Charles H. Hall's letter is fully sustained by the letter of the bank, written on the same day, and enclosing to its correspondent, the Third National Bank of Chicago, the $5000 draft for collection. They say: " Messrs. Sherman Hall and Pope, and Sherman Hall and " Lybrand are to place in your hands satisfactory secu- " rity, for *this and all paper accepted by them in the future.* " If *this* is not accepted and secured as above, please " telegraph me." (*Record*, p. 35, folio 109).

Taking these facts altogether, where, I ask, is there any proof in this case of any notice of a defence to the draft for $4,500? That draft had been procured precisely as hundreds of thousands of dollars of other drafts had been procured by Charles H. Hall from the plaintiff. It was for-

warded to the defendants precisely as hundreds of thousands of dollars of other drafts of the plaintiffs had been forwarded. It was procured for the same purpose, and remitted to the defendants for the same objects that hundreds of thousands of dollars of other drafts of the plaintiffs had been procured and remitted to them. As well attack the title of the defendants to all the other drafts received by them, as to attack their title to this particular draft. It is no answer to say, that this draft is worthless in their hands, because they refused to pay their acceptances; that the plaintiff did not attempt to impeach the defendant's title to the bank drafts forwarded them, until they refused to meet their acceptances. We answer, and with entire truth, we paid all our acceptances, promptly and faithfully, so long as you paid your drafts, forwarded to us for the express purpose of paying them. The consideration of our acceptance of the forty-five hundred dollar drafts, maturing on the 17th of March, in the sense in which failure of consideration is treated in the opinion, failed on the 17th, and John Weare knew of such failure before we did, not only knew it but ordered it. The consideration, upon which Sherman Hall & Pope accepted these drafts, was Charles H. Hall's agreement to furnish them with funds to retire them at maturity. Weare knew of this agreement; he knew that the defendants were accommodation acceptors. He knew that the draft in question was procured for that very purpose; he agreed to furnish a line of discount sufficiently large to enable Charles H. Hall to perform his agreement with his accommodation acceptors, and when he stopped payment of his draft, he knew that, in the sense in which the phrase is here used, the consideration on which the defendants accepted this and other drafts, had failed, and that he had placed it beyond the power of Charles H. Hall to perform his agreement with the defend-

ants—an agreement to which he was in fact a party. Yet the court permits him to do this; to hold the $5,000 consideration which he received for the draft of $4.500, and to escape the payment of his own obligation. We insist that on no principle of law, ever recognized as governing the rights of parties to and holders of commercial paper, can the charge of the court, on this branch of the case, be sustained.

The entire question is settled when it is determined that the defendants are holders of this draft for value. They received it, not to enable them to pay an acceptance thereafter to be made, but to pay an acceptance already made—the one upon which this suit is brought. As between Chas. H. Hall and the defendants, the consideration of the *transfer* of the draft to them, was their previous acceptance of drafts of the same amount, and maturing the same day the draft came to their hands. As between Charles H. Hall and the plaintiff, the consideration for the $4,500 draft was one drawn by Charles H. Hall on the defendants. Had the bank sued Hall on the $5,000 draft, he certainly could have set off, had he remained the holder of it, the one for $4.500. Yet, following the doctrine laid down in this case, the court would have said to him: "You cannot be "permitted to set off the draft which you hold, for $4,500, "because you have failed to pay one which the plaintiff "holds for the same amount." The counsel for the bank would argue, as they have argued here, that the consideration for the plaintiff's draft, held by the defendant, was the defendant's draft held by the plaintiff; that the defendant's draft had not been paid, and therefore *there had been a failure of consideration.* But would there not be some slight force, at least, in the answer of the defendant, that if the consideration of the draft, held by him and drawn by the plaintiff, had failed by reason of the defendant's

failure to pay his draft, then the consideration of the draft drawn by the defendant had also failed, by reason of the plaintiff's failure to pay his draft, which he had drawn for it? If the consideration of the $4,500 draft, in the hands of Charles H. Hall, would be good for any purpose, it would be good for all purposes. If he could set it off against one claim held against him by the bank, he could as well against the other. If he could set it off against the $5,000 draft, on which he is liable, he could also set it off against the $4,500 draft, and on which he is equally liable. Had he been sued, as the drawer of both drafts, he could, had he remained the holder of the one in controversy, have set it off *pro tanto*, and surely the holders for value, the defendants, have as extensive rights as their endorser would have had. I close the discussion of this branch of the case by supposing that the defendants had tendered to the plaintiff, in payment of their acceptances, held by the plaintiff for $4,500, this very draft, on the day when those acceptances matured, and *before the draft for* $5,000 *had been presented for acceptance*. Does it require any argument to show that the plaintiff would have been compelled to accept the tender? By that test must this question be determined, for no subsequently arising equities between the plaintiff and Charles H. Hall could deprive the defendants of that right.

THE FACTS.

So far as the facts in the case are concerned, we complain of the charge generally, for the reason that it practically withdrew from the consideration of the jury the defendants' entire case, and while the jury were particularly directed to consider every item of evidence tending to show fraud in the defendants, they were not instructed to consider any portion of the evidence tending to explain

those circumstances, nor was even the slightest reference made to them.

The practical effect of the charge in this respect was to tell the jury that no satisfactory explanation had been offered, and that the only evidence they were to consider upon the question was that introduced by the plaintiff, and referred to in the charge.

I. Under this branch of the case I consider, first, the charge relating to the sale of the grain in the warehouse to McAffee.

In instructing the jury from what facts they would be justified in finding that the $4,500 draft was a part of the proceeds of the draft for $5,000, discounted on the 16th, the court said: "It is also proper that you consider, in "this connection, that the day before this draft was made "by C. H. Hall on the defendants, said C. H. Hall had, "in the office of the defendants at Chicago, made a sale of "all his grain in store in Cedar Rapids to one McAffee, "and that there would seem to be no resources belonging "to the said C. H. Hall, with which to indemnify the de-"fendants for this acceptance which he had made on "them." (*Record*, p. 50, folio 150.)

As affecting the question of fraud, the court again refers to this sale at page 51, folio 152 of the record:

"You should also weigh well and carefully consider "how far the transaction between Charles H. Hall and the "defendant and McAffee, here in Chicago, in the prepa-"ration of the bill of sale to McAffee of all his, Charles "H. Hall's, grain, with the guaranty by the defendants of "the amount and value of that grain, and as the guaranty "is testified to by C. H. Hall, and not contradicted by any "other witness, I assume that you will consider it proven, "although that is for you to pass upon."

With reference to the charge as above quoted, it is to observed:

1. That the charge is entirely, altogether, and essentially erroneous in its statement of the facts.

The charge asserts that the sale of the grain was made in Chicago, in the office of the defendants, the day before the draft was drawn; whereas, the sale was *not* made in Chicago; it was *not* made in the defendants' office; it was *not* made the day before the draft was drawn. The undisputed facts are, that the sale was made at *Marion*, in the office of Mr. Stevens, McAffee's banker and attorney, on the afternoon of the 16th of March, and *after* the draft had been discounted. (*Record*, p. 45, folio 134, 135; p. 29, folio 91.)

These facts are very material, because they show that as between McAffee and Charles H. Hall, the sale was a genuine one—that McAffee refused to purchase the grain until he had had an opportunity of examining it and satisfying himself as to the quantity on hand; that he did thus examine it after his return to Cedar Rapids, and that after such examination, he was willing to risk his judgment on $10,000, as the value of the grain in store; that even then he desired to consult his counsel; that he did so, and not until he had thus consulted him was the sale perfected.

Not only were these facts withheld and withdrawn from the consideration of the jury, but they were instructed to consider the very *opposite* of the facts. They were told to consider as facts what were never proved in the case. They were told that the sale was made in a place where it was *not* made, at a time *when* it was not made, and under circumstances under which it was not made.

Again the court says: "There would seem to be no "resources belonging to the said C. H. Hall, with which "to indemnify the defendants for this acceptance, which "he had made on them."

This is altogether at war with the undisputed facts.

There were resources left to the extent of $12,400. Those resources were McAflee's notes, good beyond all question, and these notes, which the plaintiff now says he would gladly have taken as collaterals, were made, as appears from the uncontradicted evidence in this case, *for the very purpose* of indemnifying the defendants for their acceptance of the $5,000 draft, and such other drafts as they might thereafter accept for the accommodation of Charles H. Hall. Have we not a right to complain that the attention of the jury was not drawn to these facts; and that no allusion whatever was made to them ?

But let us go still further. If the sale to McAffee is to be treated as evidence of a fraud to which the defendants were parties, the court certainly should, if it alluded to it at all, have called the attention of the jury to our version of the transaction, as well as the plaintiffs', but so far from that, every scintilla of evidence tending to explain it was kept out of sight in the charge.

It cannot be said that we were without proof. In the first place:

To whom was the sale made? McAffee was, at the time of the purchase, a heavy grain dealer, with abundant means and established credit, doing business at Cedar Rapids, and residing at Marion, only six miles from Cedar Rapids, and well and most favorably known to all the parties.

What was the price for which it was sold? McAffee had agreed absolutely to pay the sum of $10,000. The bank realized from the same property less than one half that sum. The consideration therefore, was ample.

How was the price paid? By McAffee's notes, undisputably good.

Why was the sale made? John Weare had demanded that collaterals should be put up to the defendants' accept-

ances. And the testimony of the defendants and of Chas. H. Hall is that McAffee was told when the sale was proposed to him, that the reason they desired to sell the grain was to use his notes as collaterals for the defendants' future acceptances. Moreover, it is also proved that the defendants promoted, so far as they could, the sale, for the purposes stated, and with the additional object of having McAffee interested as a partner with Charles H. Hall in his future operations, thus strengthening his credit, and promoting the interests of all parties.

How were the notes used, or to be used? They were, as was originally intended, to be forwarded to the defendants, to be by them used as collaterals for their future acceptances. Charles H. Hall, J Sherman Hall and Mr. Pope, all swear positively that they were thus to be used.

Why were they not so used? The day after the sale was made to McAffee, the property was attached in his hands by the plaintiff. Sherman Hall & Pope never received the notes at all, and they were finally surrendered up to McAftee.

Now, in instructing the jury on the question of fraud, and in telling them upon what circumstances they might find fraud, not the slightest allusion is made to these facts.

A sale of property to anirresponsible party is a badge of fraud. But here the purchaser was abundantly responsible.

Inadequacy of price is also a badge of fraud. But here the price was ample.

The concealment or misappropriation of the consideration is also a badge of fraud. But here there was no concealment, and the appropriation contemplated was for the especial benefit of the creditor attacking the sale.

A hurried sale, without inquiry or examination, is also a badge of fraud. But in this case negotiations had been

pending two or three days before the sale was completed. McAffee refused to buy until he had satisfied himself as to the quantity of grain, and then, and not till then, went to his own home and perfected the purchase.

Why was it that the court did not also tell the jury that, in determining the question of the good faith of that sale, they should also "weigh well and carefully consider" these facts, proven beyond question, or, at all events, to tell them what would be their effect as evidence of the intention of the parties, if they believed, from the evidence, that such were the facts?

But a most conspicuous falsehood in this case, is the absurd pretence of the plaintiff, that the grain was to remain at Cedar Rapids, and this statement of John Weare, made upon this trial, the court seems to have unqualifiedly adopted. In speaking of this sale, the court says: "that "the jury are to consider the manner in which C. H. "Hall and McAffee acted with the bank *after* this trans- "action, by concealing the same from the plaintiff, or, at "least withholding information thereof from him, on the "subject, at the time this draft in question was obtained, "although it would seem to have been information, to "which the bank or its officers were entitled, as it related "particularly to C. H. Hall's ability to meet the draft he "was then making."

Now, I ask, why was the bank entitled to this information? If Charles H. Hall had a right, under his agreement with the bank, to sell the grain at all, he had a perfect right to sell to McAffee. But if he had, in fact, agreed to hold it at Cedar Rapids, then there would have been an impropriety in the sale, and the bank would have been entitled to the information. But Weare knew perfectly well that the acceptances of the defendant must be ultimately met by the proceeds of the grain, and it was not of

the slightest consequence whether the grain was sold at Cedar Rapids, and the proceeds forwarded to the defendants at Chicago, or the grain shipped to Chicago, then sold, and the proceeds there applied. Nor did the information relate to Charles H. Hall's ability to meet the draft. He had always met his drafts by the sales of his grain; he had never coummunicated the fact of his sales to the plaintiff, and his purpose was to meet this draft in the same manner.

But to return to the pretense referred to. As Weare states the case, the defendants were to accept the drafts of Charles H. Hall without any consideration whatever, and purely for his accommodation. In addition to this, they were to withdraw from their own capital, every dollar of which they needed, securities satisfactory to the Third National Bank of Chicago for those acceptances. The money received by Charles H. Hall, on the drafts discounted by the plaintiff, was to be used by him in the purchase of grain at Cedar Rapids to be sold at Chicago; in no other way could the defendants be indemnified; in no other way could Charles H. Hall expect to protect his drafts, and this the bank knew perfectly well; and yet we are asked to believe, that in addition to the defendants' acceptances, in addition to to their collaterals, the grain itself was to be kept at Cedar Rapids as security for the payment of those acceptances, and from the sale of which alone could any one look for the payment of that paper.

I can safely say, that never since business was transacted between sane men, was an arrangement so utterly absurd as this entered into. And yet, how much of this charge of fraud rests on this absurd and perjured statement. Take that out of the case; concede that it was in the contemplation of all the parties that Hall was to sell his grain

for the best price he could procure for it, and to responsible parties; and the sale to McAffee loses its entire significance as furnishing any evidence of fraud.

At a former trial of this case, Mr. John Weare was made to see the absurdity of this pretence, and as we showed on this trial, he then testified:

"Q. Why was it that you required Sherman Hall & "Pope to put up collaterals? A. This man, Charley "Hall, wanted to begin to move his grain off.

"Q. Off where? A. He wanted to—I remember "he said he wanted to ship wheat to Chicago, on which "this large line of discount had been made, as I under-"stand it." (*Record*, p. 47.)

The testimony of Weare, on a former trial, and read in evidence upon the present, shows that so long as the grain remained at Cedar Rapids, he did not care about collaterals, but when Charles H. Hall insisted upon shipping it, that then he insisted that collaterals should be substituted in place of the grain. (*Record*, p. 48, folio 142.)

But one of the most important questions of fact in the entire case was as to the precise time when the drafts, discounted on the 11th and 12th, were presented for acceptance.

Weare testified that on the 16th day of March, but a short time after he had discounted the draft for $5,000, he received a telegraphic dispatch from Mr. Parsons, of the Third National Bank, advising him that those drafts had been protested for non-acceptance. The question was a most vital and important one, and on the part of the defendants, it was most earnestly contended from the evidence in the case, that the drafts were not presented for acceptance on the 16th; that Weare, on that day, received no such dispatch as he stated; and that the defendants never refused either payment or acceptance of any draft drawn

upon them by Charles H. Hall, until they received notice on the 17th of the stoppage of the $4,500 draft; and that, had it not been for that fact, the $5,000 draft would have been accepted on presentation. Among the other facts tending to show when those drafts were presented for acceptance, we introduced the notices of protest, which bore date on the 18th. This fact alone the Court singles out in the charge, ignores every other circumstance tending to show when the drafts were in fact presented, and without making the slightest reference to any other testimony, says to the jury that the date of the protest is not of itself conclusive evidence that the drafts were not presented before the 18th. This was, in effect, saying to the jury: If you can get over the fact as to the date of the protests, all other difficulties are removed. Now, the date of the protests was by no means the strongest evidence in the case, showing that those drafts were not in fact presented on the 16th.

1. There is not one scintilla of evidence in the case showing that they were then presented for acceptance. Brady, the messenger, does not so swear. Parsons does not pretend so to testify. J. Sherman Hall, Pope and Gooch, all testify that they were *not* then presented; and unexplained, the protests would be very satisfactory evidence. How extraordinary it would be, indeed, that these drafts should be presented for acceptance on the 16th, acceptance refused on that day, and the protest held over until the 18th. But the solitary evidence upon which this claim rests, is the pretence of John Weare that on the 16th he received a dispatch, not that those drafts had been presented merely, but that they had been *protested* for non-acceptance.

At the risk of trenching upon the patience of the Court, I beg to recapitulate the evidence in this case, demonstrating the utter and willful falsity of this statement.

1. It is one of the most curious features in the case, that important as this telegraphic dispatch has always been considered, it has never been produced in court. No one has ever been permitted to see this dispatch. Several times have the facts in this case been tried, and yet no dispatch has ever been produced. The last trial but one of this case was had in this city, and before the fire. The original of the dispatch was here, and could have been produced. Weare testifies that his counsel at that time had the dispatch which he received, in his possession, but even that was not offered in evidence, nor in any way produced. Is it possible to believe that Weare ever received such a dispatch, would have it in his possession, and fail to produce it, when its existence was denied, and the fate of his case rested upon his ability to produce it? The reason that this pretended dispatch was never produced, was this: It would have been shown to have borne date the 17th day of March, and its substance would have been information of the protest of the drafts, maturing on that day, for *non-payment*.

The Court was careful to instruct the jury that the date of the protests was not conclusive evidence of the fact of presentation for acceptance. Would it not have been quite as proper to have told the jury that it was legitimate for them to consider the fact that this pretended dispatch had never been introduced in evidence, even when, according to his own statement, the plaintiff had it in his possession, in determining whether such a dispatch had in fact ever been received?

2. But we are not without proof, clear and conclusive, that those drafts were *not* presented on the 16th; that it was a physical impossibility.

When did the drafts leave Cedar Rapids?

All the drafts, save one, were sent in on the night of the 15th. (*Record*, p. 31, folio 96.)

But when did the draft sent in on the 13th, reach here?

Weare's testimony has settled that question. He was recalled for the purpose of attempting to clear up some of the very many discrepancies in his testimony, and with reference to the draft sent on the 13th, he says: "A number of drafts, drawn on the 11th and 12th, were sent in "on the 12th or 13th of March, and the balance were sent "in on the 15th; that he afterwards learned that by the "detention of the mail bags at Clinton, the drafts that "were sent in on the 12th or 13th, and those that were "sent in on the 15th, all went in together, and arrived in "Chicago on the night of the 15th, or the morning of the "16th." (*Record*, p. 46, folio 138.)

Now, let it be remembered that this is the testimony of the plaintiff, drawn out on his direct examination, by his own counsel. It is true that his counsel stated for him, and Weare assented to it, that the drafts reached Chicago on the morning of the 16th, but that was impossible, for he had already sworn that they left on the *night* of the 15th. Moreover, he says that they were *all* detained at Clinton. And thus, according to his own testimony, it was an utter impossibility for these drafts to have reached the Third National Bank one instant earlier.

Had the drafts all left Cedar Rapids on the night of the 15th, they could not, even had there been no delay in the trains, have reached Chicago before between two and three o'clock on the afternoon of the 16th. They could not, by any earthly possibility, have passed through the Post Office and have been received at the bank in time for presentation on the 16th. They could not have reached the bank, in the ordinary and usual course of the distribution of mails, before the morning of the 17th, even had there been no delay, and a delay would have thrown them over to the 18th.

I inquire again, whether it would not have been not only entirely proper, but a right to which, for the elucidation of the real truth of the matter, the plaintiffs were entitled, that the Court should have told the jury that in determining whether those drafts were presented on the 16th, they should "weigh well and carefully consider" this most important testimony? Nothing of the kind was done; but, on the other hand, a single item of proof was selected, and the jury told that that alone was not conclusive.

Moreover: *The notices of protest all bear date the 18th.* Presumptively, at least, this would show that they were *then* presented, and not until then.

The plaintiffs' witness, Mr. Brady, the messenger of the bank at that time, says that in the absence of instructions, it was their invariable custom to protest immediately upon the same day, upon the refusal to accept, and that drafts received for collection were presented for acceptance at once. (*Record*, p. 37.)

But again: *These drafts could not have been presented for acceptance on the 16th, because the proof is clear that they were presented in the forenoon*, and these drafts could not have reached here one instant sooner than half past one o'clock in the afternoon.

But the most decisive fact still remains. In the batch of drafts presented, there was one for $5,000.

Brady says: "I have a recollection of taking a *batch* "of drafts; *that is what the trouble was about.* Could not "state whether it was the 16th, 17th or 18th. These "acceptances he presented to Gooch, the bookkeeper for "the defendants, who said to him, 'Leave the notice of "them, and we will see about it this afternoon.'" (*Record*, p. 37.)

In referring to this batch of drafts thus presented, Brady

says: "*I think, however, there was one five thousand.*" (*Record*, p. 37.)

Upon the same point, and referring to the same batch of drafts, *Parsons* says: "*There was one draft for five thousand. I recollect distinctly.*" (*Record*, p. 37.)

Now there was but *one* five thousand dollar draft. That was the one discounted *on the 16th*, and which reached here on the same train with Weare, about four o'clock in the afternoon of the 17th. So that *it* was for the first time presented for acceptance on the morning of the 18th.

Human ingenuity may be safely defied to meet this crushing combination of circumstances. As conclusive as they are, resting almost entirely on the testimony of the plaintiff and his witnesses, they were, nevertheless, entirely ignored and overlooked by the Court, and the attention of the jury withdrawn from them.

But one circumstance remains, having the slightest tendency to support the statement that those drafts were presented on the 16th. Mr. Parsons testifies that he did send a dispatch to Weare, advising him of the protest of drafts; and, without attempting to state the day of the month, he says he *thinks* that Weare *came in* the next day after.

Now, when did Weare come in? He says that they took the night train from Cedar Rapids. On time, they would have reached here at half past one; he says that train *was behind.* Hall swears that they did not reach here until about four o'clock. Both Weare and Hall testify, that they went immediately to the office of Sherman Hall & Pope; they remained there nearly an hour; and hence Weare did not see Parsons until the morning of the 18th; the bank was closed, and Weare does not pretend to have seen him. The dispatch, therefore, was sent the day before, the 17th. *Now, what was* that dispatch? On the 17th, the two drafts sued on, amounting to $4,500,

to protect which the defendants received the plaintiffs' draft, matured, and in consequence of the stoppage of the plaintiffs' draft, defendants refused to pay, and those drafts were on the 17th protested for *non-payment*. Those protests were offered in evidence in the case. They bear date the *17th*; those were the drafts which were protested; the dispatch sent, was one advising the plaintiff of such protest; and because that was the fact of the matter, the dispatch itself has, from first to last, been withheld; its production would have stamped this whole case with that infamy of deliberate perjury, with which it deserves to be stamped.

From first to last, not a single witness testifies that those drafts were presented for acceptance on the 16th—Gooch, Sherman, Hall, and Pope, all swear that they were not; all the collateral circumstances show that they were not; the protests themselves show that they were not; and on this foundation, a demonstrated falsehood, does the plaintiffs' case rest.

We also complain that in instructing the jury, the court submitted to them, for their finding, propositions, which there was no evidence whatever in the case to support.

Thus, at page 49 of the record, folio 146, on the issue of fraud, the court said to the jury, that if, in addition to finding from the evidence, that Charles H. Hall had agreed that the draft for $5,000 should be accepted by the plaintiffs in error and paid by them, "and that, at the same time, "it was well understood between said Charles H. Hall "and the defendants that said five thousand dollars would "not be accepted, nor securities put up, then you will be "justified in finding that issue for the plaintiff." The same instruction was substantially repeated by the court. (Record, pp. 52, 53, folios 156, 147.)

There is not in this record a scintilla of evidence show-

ing, or tending to show, that there was any understanding whatever between the plaintiffs in error and Charles H. Hall that the draft for $5,000 should not be accepted and paid. On the other hand, all the evidence in the case, upon that point, leads to a directly opposite conclusion. The plaintiffs in error both testify that the draft would have been accepted and paid had it not been for the stoppage of the $4,500 draft, received by them. The letter to them from Charles H. Hall, enclosing that draft, shows it. He advises them that he has secured a line of discount from $20,000 to $25,000, to run four to six months. The sale to McAfee was made for the express purpose of enabling the plaintiffs in error to furnish the required collaterals. By this letter, the plaintiffs in error are advised that "*he*" (Weare), expected them to place collaterals to that draft and all *future* acceptances.

Yet, all these "*pregnant*" facts are sedulously excluded from the consideration of the jury; they comprise all the facts in the record which tend to throw the slighest light upon the intention of the parties as to the acceptance and payment of the $5,000 draft. Not only did the court shut its eyes, and practically invite the jury to close theirs to all the evidence in the case, which tended to relieve the plaintiffs in error from the charge of fraud preferred against them, but he invited the jury to wander into the fields of mere conjecture, guess work and suspicion, if facts should be found wanting. Thus the court (*Record*, p. 51, folio 151), directs the jury, in examining whether the allegations of fraud have been made out by the proof, to "carefully consider the relations existing between Charles "H. Hall and the defendants, the fact that he is a brother "of one of the defendants." Again, the court (folio 153), after alluding to the sale of the grain at Omaha, &c., leaves it to the jury to say, "whether it was a part of a conspiracy

" and collusion between Charles H. Hall and the defend-
" ants, by which all Charles H. Hall's property was to be
" directly or indirectly transferred to the defendants to de-
" fraud the bank." There was nothing whatever in the case to justify or support this line of argument to the jury. The grain at Omaha was not sold to the plaintiffs in error. The defendants in error refused to receive these notes, to the amount of $12,400, which were good, beyond question; preferred to force the property to a sale, from which they realized not to exceed the sum of $5,000; and yet the jury are invited to consider these facts as a corrupt and fraudulent conspiracy, between Charles H. Hall and the plaintiffs in error, to defraud the bank. This was not a trial by jury. Counsel, indulging in such a line of argument, utterly unsupported by the facts, should have been stopped by the court, and even if we are to concede to the courts the right to argue cases to the jury on either side, they should certainly be allowed no greater latitude than is accorded to counsel, and should confine their arguments within the boundaries of the record.

THIRD.—THE COURT ERRED IN PERMITTING THE DEFENDANT IN ERROR, WHILE ON THE STAND, TO TESTIFY AS TO THE CONTENTS OF A LETTER WHICH HE CLAIMS WAS EXHIBITED TO HIM BY CHARLES H. HALL AND WRITTEN BY THE PLAINTIFFS IN ERROR.

The materiailty of the letter, of which the defendant in error was permitted to state the contents, cannot be questioned. It amounted to a request by the plaintiffs in error upon Charles H. Hall to procure discounts at the defendant in error's bank, and an agreement to accept and pay all such drafts as might be drawn upon them by Charles H. Hall. The proof tended, at least, to sustain the theory of the plaintiff in error that there was a fraudulent collusion

between the plaintiffs in error and Charles H. Hall, by which the latter was to procure discounts for the benefit of the plaintiffs in error.

No effort whatever was made to procure the original of this pretended letter. Charles H. Hall was present at the trial, and sworn as a witness ; the letter if any such there was, was presumably in his possession, yet no effort whatever was made for its production, but the defendant in error, was permitted to give his own version to this most important paper.

Judge GREENLEAF in his Treatise on Evidence, Vol. 1, Sec. 88, thus lays down the rule : " Oral evidence cannot " be substituted for any writing, the existence of which is " disputed, and which is material either to the issue be- " tween the parties or to the credit of the witness." In *The Queen's Case*, 2 Brod. & Bing., 287, Lord TENTERDEN says, with reference to this rule : " I have always acted " most strictly on the rule, that what is in writing, shall " only be proved by the writing itself. My experience has " taught me the extreme danger of relying on the recollec- " tion of witnesses, however honest, as to the contents of " written instruments ; they may be so easily mistaken " that I think the purposes of justice require a strict en- " forcement of the rule."

In *Richardson* v. *Peyton*, 1 Cranch. Circuit Court Reports, 418, the court refused to suffer the plaintiff to give parol testimony to prove the contents of a letter written by the defendant to a third person who was no party to the suit.

If ever there was a case where this rule should have been strictly enforced, the present is that case.

It is most extraordinary that a keen business man, such as the defendant in error certainly is, should have relied and acted upon a paper of so much importance, upon barely hearing it read to him. It was substan-

tially a letter of credit, as he stated it, and it is strange that he did not, at the time it was produced to him, require its possession. But it is a noticeable feature of this singular case, that all rules by which business men are ordinarly governed seemed to have been ignored. Every paper which seems to have been of the slightest consequence to the defendant in error is conveniently absent, and his recollection is appealed to to supply their place. Thus, with his suspicions fully aroused, as he says they were, he contents himself with taking Charles H. Hall's statement as to the contents of a telegraphic dispatch, which he claimed to have received from his brother on the 16th day of March, but never calls for the production of the dispatch itself, and

FOURTH.—THE COURT PERMITTED THE DEFENDANT IN ERROR TO STATE, FROM HIS RECOLLECTION, THE CONTENTS OF A TELEGRAPHIC DISPATCH WHICH HE CLAIMED TO HAVE RECEIVED FROM MR. PARSONS ON THE 16TH OF MARCH.

With reference to the copy of the original dispatch which the defendant in error claimed to have received from Parsons, it appears that it had been among the files, but that it had never been used on any former trial. Even had this copy been offered, it would have been incompetent. The original of the dispatch could have been procured from the office at Chicago; no effort, however, was ever made to procure it. The copy of the dispatch received by Weare could have been procured from the office at Cedar Rapids, but no effort was ever made in that direction. With the copy in his possession on a former trial, he deemed it wise to withhold it, and the reason why no efforts were ever made in this direction is, that, had the dispatch been produced, it would have been shown to be of the date

of the 17th of March, advising the defendant in error of the protest of the drafts maturing on that day for *non-payment*. The point was a vitally material one. For if John Weare received no such telegram on the 16th of March, as he pretends that he received, his whole case goes to pieces.

The evidence was material in that it tended to show that the plaintiffs in error had refused to accept drafts drawn upon them before payment of the $4,500 draft was stopped, and tended to show that there was no intention on their part to accept and pay the draft of $5,000, drawn upon them on the 16th.

It seems to us that common fairness required that some effort should have been made to procure that dispatch before Weare was permitted to state its contents. The curious retention of the dispatch received, in their possession, without ever offering it in evidence upon previous trials, should have admonished great caution, and, had there been an honest desire to lay the exact truth before the jury, Mr. Weare could easily have procured from the Cedar Rapids office, where he lived, the message, as they received and delivered it, and there is no evidence in the case showing or tending to show that the original of this important paper could not have been procured in Chicago.

FIFTH.—THE DECLARATIONS OF MCAFFEE, AS TESTIFIED TO BY THE DEFENDANT IN ERROR, WERE CLEARLY INCOMPETENT.

It was not even pretended in the case that McAffee was engaged in a conspiracy to defraud the bank. There was no proof whatever tending to show any such fact, and yet the witness was permitted to detail a conversation which he pretended to have had with McAffee several days after his purchase, and purely with reference to the circum-

stances under which, and the consideation for which the purchase was made.

McAffee was a competent witness as to all those facts, and, had the defendant in error honestly desired to get at the real facts attending the purchase, he would certainly have secured either by his presence or by deposition, his testimony. This, however, would not answer the purpose, and they preferred to rely upon John Weare's version of what McAffee had told him as to the purchase, rather than upon McAffee's own history of the transaction.

We are utterly at loss to conceive upon what principle this testimony was received. The rule as to proof of this character is thus stated in 1 Greenleaf on Evidence, sec. 110:

"It is to be observed that where declarations offered in "evidence are merely *narrative of a past occurrence*, they "cannot be received as proof of the existence of such oc- "currences."

So it was held in *Johnson* v. *Sherwin*, 3 Gray, 374, that the reasons given by a wife on the *day after* her return to her father's house, for leaving her husband, are not a part of the *res gestæ*.

Weare details a conversation had with McAffee a day or two after the grain purchased by him was attached, in which McAffee is made to say that "he was not out of "pocket any; that he had made Sherman Hall & Pope "refund to him the money which he had paid, and the "notes had been returned, so that he was just where he "begun." (*Record*, p. 34, folio 105.) At this time McAffee was not in possession of the property; he was asserting no claim to it, and the entire statement related to past occurrences. How dangerous evidence of this kind is, clearly appears when it is remembered that the plaintiffs in error never received a dollar in money from McAffee,

and hence never refunded him any. The fact is that McAffee received $2,000 from the plaintiffs in error, which he refunded, and the note for $12,400 was never delivered to Sherman Hall & Pope, (*Record*, p. 45, folio 134), and yet John Weare puts the ingenious falsehood into the mouth of McAffee, that "he had *made* Sherman Hall & Pope refund "the money which he had paid," thus endeavoring by words put in McAffee's mouth, to carry the impression to the jury that in some way or other the plaintiffs in error were to be benefited by that sale; that they had received the consideration, and that McAffee was compelled to resort to coercion, in order to get it back.

Thus every syllable of evidence in this case tending to show any fraud in the plaintiffs in error was incompetent, and manufactured for the purpose.

The pretended letter from the plaintiffs in error to Chas. H. Hall was never written by them, nor received by him, but John Weare was permitted to invent such an one as suited his purpose.

It is a demonstrated impossibility that John Weare should have received, on the 16th day of March, a telegram advising him of the protest of certain drafts, for the drafts had not at that time been presented. Yet, without the slightest effort to procure the original, or even a copy, he was permitted to invent one to suit the supposed emergencies of the case, even in face of the fact that when the one received by him was in his possession, he declined to produce it upon the trial.

McAffee knew as well as any one possibly could know, the circumstances attending the purchase by him from Charles H. Hall, and there was no difficulty in procuring his evidence; yet John Weare was permitted to invent an account of that transaction, and palm it off upon the jury as the statement of McAffee—the statement thus concoc-

ted being a falsehood upon the face of it, as I have shown.

Take these fictions from this case, and there is nothing left of it; and we complain that these fictions were foisted upon us in violation of well established rules of evidence.

FINALLY. It is difficult to see how fraud could be predicated of the particular transaction complained of. The draft of $5,000 was discounted, as all the parties well knew, for the purpose of enabling Charles H. Hall to meet his drafts due the next day. For that purpose did he procure the draft for $4,500. This purpose was known to the defendant in error. Had Charles H. Hall appropriated that draft to some other use, or had the plaintiffs in error themselves undertaken to use it in a manner different from that originally contemplated, there might have been some room for complaint. But they undertook to make precisely the application of it, which Weare desired, and are now seeking to use it precisely for the purpose intended by the defendant in error, when he delivered it to Charles H. Hall, and by Charles H. Hall, when he forwarded it to them.

We insist that we ought to be permitted to apply the draft held by us to the retiring of our acceptances, as was originally intended by all parties, and are confident that if the facts and the law are ever properly laid before a jury, we shall succeed in doing so. We respectfully urge that the judgment be reversed.

Respectfully submitted.

EMERY A. STORRS,

Of Counsel for Plaintiff in Error.

CHICAGO, March 2, 1875.

Supreme Court of the U. S.

J. SHERMAN HALL & WILLIAM J. POPE,
PLAINTIFFS IN ERROR,

vs.

JOHN WEARE,
DEFENDANT IN ERROR.

Argument for Plaintiffs in Error,

By SLEEPER & WHITON, Attorneys.

Stillman & Benedict, Printers, 186 Washington Street.

Supreme Court of the U. S.

J. SHERMAN HALL & WILLIAM J. POPE,
PLAINTIFFS IN ERROR,

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Argument for Plaintiffs in Error,

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Supreme Court of the U. S.

J. SHERMAN HALL AND WILLIAM J. POPE,
PLAINTIFFS IN ERROR,

vs.

JOHN WEARE,
DEFENDANT IN ERROR.

There are several errors in the printed record in this case, some important and some unimportant, which we wish to refer to, by by way of correction, before commencing a discussion of this case.

1. At page 7, third line from bottom, after the word "thousand" "five hundreds" should be inserted. If it is not in the transcript of the record it should be, as is evident from reading the 15th to to the 26th lines inclusive of page eight.

2. At page 18, line 12, read "of" for "if."

3. At page 30, line 30, read "nor" for "now."

4. At page 39 the amount of draft of March 16, 1869, 15 days, should read "$5,000" instead of "$2,000."

5. At page 34, second line from bottom, read "have" for "hear."

6. At page 36, top line, for "on entry" read "an entry."

7. At page 38, line 29, for "protest" read "protect."

8. At page 40, line 5, remove the "—" between "grain" and "bags," and in lieu thereof insert a comma, so that it will read "grain, bags, &c."

9. At page 41, line 5, for "endorsing" read "enclosing."

10. At page 41, line 15, for "$125,370" read "$12,537.02." We think there is some mistake in these figures even, as well as in the statement commencing at marginal paging 121, on page 40. The correct statement appears in the testimony of GEORGE GOOCH,

marginal page 124, where the debit balance, March 17, 1868, is given as "$12,237.87" and debit balance June 22, "$12,537.02."

11. At page 42, line 4, for "now" between "unpaid" and "never" read "nor."

12. At page 49, at the beginning of line, for "and" read "on."

13. At page 52, line 9, for "new" read "non."

I.

1. The first point we shall make is on the allegation in the 2nd plea, commencing with second word in the third line on page seven, as follows:

"And the said defendants further aver that the costs and charges of said protest amounted to a large sum of money, to wit: to the sum of five dollars, which sum was paid out and expended therefor by these defendants, whereby and by means whereof, and by force of the statute in such case made and provided, the said plaintiff became and was liable to pay to the said defendants the said sum of money in the said bill of exchange mentioned and the said costs of protest, and the interest on the said sum of money in the said bill of exchange specified, until the same was paid, and five per cent. damages on the said sum of money; and being so liable, and in consideration thereof, he, the said plaintiff, afterwards to wit: on the day and year aforesaid, and at the place aforesaid, undertook and promised the said defendants to pay to them said sum of money, and the interest thereon, and the said five per cent. damages, and the said costs and charges of protest," &c.

2. There is no denial or avoidance of this allegation in the replications to this plea. It is a substantive and material allegation of a promise, made after the bill or draft had become due, and had been protested, and after the five per cent. damages had been fixed. The allegation and the promise are admitted. We moved in arrest of judgment on this ground. The court overruled our motion and we have excepted. See for the motion printed record, page 26, original page 83; for order overruling it, original page 86; and for exception printed record, page 53, original page 158.

In *Smith vs. Smith*, 4 Wendell, 468, a motion was made by defendant for judgment *non obstante veredicto*, or that the judgment for plaintiff be arrested. The court say, a defendant cannot ask

for judgment *non obstante veredicto*, and denied the motion in arrest, because the matter for arresting the judgment did not appear on the record, and could not be founded on a case made.

In *Schemerhorn, et. al., Exrs., vs. Schemerhorn, et. al.*, 5 Wen. 513, the defendant pleaded *actio non accrevit infra, &c.* Replication that the testatrix commenced suit within six years and died, and that plaintiff commenced suit within one year, &c. Rejoinder denied suit by testatrix; plaintiff had a verdict, and defendant moved for judgment *non obstante veredicto.* The Court say on such a motion, by a plaintiff, when the verdict is for the defendant, the court arrest the judgment in his favor, and do more, give judgment for the plaintiff. A motion in arrest and for judgment *non obstante*, are both made on the record, and the court treated the motion as a motion in arrest. The motion was denied because the court held that, commencing suit by the testator before the statute had run, and the commencement of suit by her executors within one year after her death, brought the case within the equities of the statute; and the jury having found that issue against the defendant, the replication was a good answer to the plea. If, however, the court had held that the replication was not an answer to the plea, the judgment would have been arrested.

In *Bellows vs. Shannon*, 2 Hill, 86, the plaintiff in his replication set up a warrant in his hands as constable, under which he justified his act in arresting the defendant, and doing the things complained of in the plea. The defendant rejoined, that plaintiff did not acquaint or give him notice that a warrant had been issued or that he had any warrant or process for his arrest; "*nor did the defendant know that a warrant had been issued or that the plaintiff had any warrant or process for his arrest.*" *Surrejonder;* that plaintiff did acquaint and give notice, &c., but the other allegation in the plea, "*that the defendant did not know*," &c., *was not otherwise traversed.* The jury found defendant guilty on the plea of general issue, and assessed damages at $45, but on the issue joined on the *Rejoinder* and *Surrejoinder*, they found for the defendant *that, plaintiff did not acquaint him*, &c. Defendant moved for judgment *non obstante*, or that judgment on verdict of guilty be arrested. Plaintiff also moved for judgment *non obstante.*

The Court denied the plaintiff's motion because the jury had found that the plaintiff did not give notice that he had a warrant for his arrest, and because the *rejoinder alleged, and not being*

denied by the surrejoinder, it was admitted that, the defendant did not know by any other means that a warrant had been issued.

True they denied the defendant's motion for the reason that the issue found for him, and the fact alleged in his rejoinder, and admitted by the surrejoinder, because not denied, entitled him to judgment on the whole record, of course, and he could sign judgment without motion.

3. Now our plea alleges the making of the bill by the plaintiff, the endorsement to the defendants, presentation to the payee and refusal, protest and notice to plaintiff. This was sufficient *prima facie* to entitle us to set it off against plaintiffs' claim, or to maintain our cross-action.

But the fact was that, after all this had occurred, the plaintiff promised to pay it to us, hence we made the allegation of the subsequent promise. The plaintiff has replied first, that consideration of the bill had failed, of which defendants had notice; second, that it was obtained by the fraud of Charles H. Hall, of which defendants had notice. But there is no allegation denying this subsequent promise. We submit that, by the rules of pleading, every substantive and material allegation in a pleading, is admitted, unless it be denied in the pleading put in in answer; that we were entitled to an arrest of the judgment in the Court below, and are entitled to have it arrested here.

4. Neither the failure of consideration, nor the fraud of Chas. H. Hall, rendered the bill void; they only enabled the plaintiff to avoid it. If after the fraud had been committed, or after the consideration had failed, Weare promised the defendants to pay, he waived his right to avoid the bill, and made it a valid set-off in their hands.

5. But, in this case, our plea was in the nature of a cross-action, and if there was any material averment not answered, the admission or confession of which, would have entitled us to judgment, had we been plaintiffs in an action on the bill, there would seem to be no doubt of our right to have the judgment arrested on the verdict in favor of the plaintiff. Our bill exceeded the claim of the plaintiff, and if it were allowed no judgment could be entered against us.

6. Indeed when we consider the character of a plea of set-off, and the judgment which follows, if it be sustained, we submit that we were entitled to a judgment on the record, for the amount

that our bill, and the damages and protest fees exceed the bills counted on by the plaintiff.

We have named our plea a cross-action. It is so most clearly.

1. If we had proved set-off just equal to the plaintiffs' demand, judgment would have been that the plaintiff take nothing by his declaration.

2. If we had proved that our claim of set-off was more than the plaintiffs' demand, the judgment would have been that the plaintiff take nothing by his replication, and that the defendant's recover against the plaintiff the sum found by the jury in excess of the plaintiffs' claim.

3. We are, as to our plea of set-off, plaintiffs. We offer to apply to the payment of our claim, all that we owe the plaintiff, and ask for judgment for the excess. We base our claim upon the bill, the statute, and the promise to pay made subsequent to the protest, and the accruing of the damages. We ought to be permitted to sign judgment for the amount admitted to be in excess of plaintiff's claims.

II.

It is alleged in the defendant's third plea (page 7 of printed record, pages 20 and 21, original) that, the bills of exchange mentioned in the declaration were delivered to plaintiff, as cashier of the First National Bank of Cedar Rapids, that it then and there became the legal owner and holder of them, and continued so until the commencement of this suit.

Plaintiff in both replications to that plea, alleges that said bills of exchange "are held by him and this suit is prosecuted by him, for and in behalf of that bank." (Pages 12 and 13 printed, and 37 and 42 original record). We may also add, not as affecting the point under consideration, but as a fact in the case that, the plaintiff testified (page 35 printed record, on cross-examination.) "I am not the owner of the drafts sued on; they belong to the First National Bank of Cedar Rapids. The bank owns them, and I have no interest in them, except as a stock holder, am not sure I owned any stock when these drafts were discounted."

On this allegation, in the plea, and in the replication, we also moved in arrest of judgment; the court overruled out motion, and ordered judgment on the verdict to which we excepted. The ground of our motion, of course, was that on the record it stood,

admitted that the plaintiff was not the promisee in the drafts, that the defendants did not undertake or promise in manner and form, as the plaintiff had alleged in his declaration.

It may be claimed that Weare could bring this suit in his own name, or that the bank could treat the promise in the bills, as made to it, and maintain an action in its name. We answer by reference to the language of our plea, original record pages 20 and 21, that at the date of the two bills, described in the declaration, the plaintiff was cashier of the Bank, and so continued to the commencement of the suit; that they were delivered to plaintiff, as cashier, for the Bank; "*and the said Bank then and there became, and was the legal owner and holder thereof, and each of said bills of exchange, and so continued to be such legal owner and holder of said bills of exchange and of each of them, from the date of each until the commencement of the suit.*" As before stated, this allegation is not denied by the replication. Copies of the two bills are annexed to the declaration, and are on the record, and bear no endorsement or assignment, so that the legal title has not been transferred from the Bank to the plaintiff.

The words "legal owner and holder," have a well defined legal meaning, when used to describe the title to negotiable paper. A "*legal owner*," of negotiable paper is one who can maintain an action, in his own name, on the promise contained in it, to recover the contents, one who under the law merchant is a party to the paper, who is either the original promisee, or has become such, when the paper is payable to order and not to bearer, by endorsement of the payee or promisee, and is not one who, by any means falls short of being a party to the paper, not one who may have a right to the money mentioned in it, but cannot enforce that right by an action at law, in his own name, to recover the contents. That these bills were made payable to and discounted by the Bank, by being payable "to the order of John Weare, cashier," and that the Bank, by that language became a party to them, and could maintain an action in its corporate name is well settled by the decisions of numerous courts. We do not think a respectable authority can be found against this rule. At all events, such is the current of all the modern decisions. We refer to a few only as we deem it unnecessary to write a digest.

Watervliet Bank vs. White, 1 Denio, 608.
Farmers & Mechanics Bank vs. Troy City Bank, 1 Douglass [Mich.,] 457.
Barney vs. Newcomb, 9 Cush., 76.

In *Baldwin vs. Bank of Newbury*, 1 Wallace, 234, this court we think has settled the doctrine we contend for. The only difference between that case and this, is that, here the admission is absolute by the pleadings and on the record, while there it was stipulated that the fact could be proved.

If the Bank was the payee in those drafts, it is manifest the promise made by the defendants, by their acceptance of them, was to pay the contents of those drafts to the Bank. If they promised to pay to the Bank, they did not promise to pay to Weare, and he could never become the "*legal owner and holder*," of the promise, but by endorsement by the Bank to him, while it needed no endorsement by him to vest the legal title to them in the Bank, or to enable it to recover the contents of the bills in an action in its corporate name.

If those bills had been payable "to the order of the First National Bank of Cedar Rapids," and Weare had offered them in evidence without endorsement, of course he would have shown no right to recover upon them. The circumstance that they were payable to it, by being payable to its cashier, instead of by its corporate name, did not make "John Weare" a party to them, even though his name is written in the bills, it being admitted that he was its cashier, and that they were discounted by and belonged to the Bank. Under the allegations of the plea and admissions in the replications, the case stood upon the pleadings, precisely as it would upon the proof, had the bills been payable "to the order of the Bank by name, and not endorsed to Weare." If Weare had endorsed those bills, "John Weare, cashier," it would have effected an endorsement over, and vested the legal title to the bills in the endorsee. But it would have been the endorsement of the Bank and not John Weare's individual endorsement. Weare would not have been a party to the bills nor have been liable individually, on the endorsement, but the Bank would, in case of dishonor.

Houghton, et al vs. First National Bank of Elkhorn, 26 Wis., 663.

III.

Objections to Evidence and Exceptions.

I. The defendant's objected to reading in evidence the paper purporting to be a certified copy from the records, of a bill of sale from Charles H. Hall to David T. McAffee, found at page

29, printed record. It was not competent evidence for the reasons:

1. The original was not shown to have been lost or destroyed.

2. The paper was not properly anthenticated so as to entitle it to be read.

II. The admission of the paper was a plain and palpable violation of the common law rules of evidence, and the Statutes of Illinois did provide for its admission.

1. McAffee was a competent witness to prove the original and produce it. If it could not be produced because lost or destroyed, that fact should have been proved. If it be said that it was returned to C. H. Hall, the duty of producing it by him, or establishing its loss or destruction, before secondary evidence could be used, was the same.

2. The copy was not properly authenticated to warrant its reception in evidence. See Act of Congress of March 27, 1804, and sec. 906 R. S. U. S. This statute requires the exemplification of books kept in a public office not pertaining to a court, to be attested by the keeper of the records or books, and the seal of his office annexed, "together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or by the Governor, or Secretary of State or Territory, that the attestation is in due form." In case of a presiding justice's certificate, his official character must be also certified to by the clerk of his court, under seal thereof. There was no pretence of a compliance with this statute, and it was error to admit it in evidence.

III. At page 30, printed record, Weare was permitted against our objection and exception, to state the contents of the books of the Bank, without proof of their loss or destruction. This was a violation of the rules of evidence, and if the evidence be deemed material, is error for which the judgment ought to be reversed.

IV. At the same page 30, we objected to Weare testifying to the contents of a letter which he said he saw in Charles Hall's hands in November, 1868, from Sherman Hall, & Pope, on the ground that it was not the letter of the defendants nor in their possession. Our objection was overruled; we excepted, and he stated the contents in his own way.

1. The letter was in Charles H. Hall's possession. He was a witness in the case. No attempt was made to show that it was not then in his possession, nor that it was lost or destroyed.

2. We may say here, that, Pope at page 39, original, 117, and J. Sherman Hall, at page 43, original 128, say they never wrote any such letter to Charles H. Hall, so, of course, Weare never saw any such letter.

3. The letter, as Weare testified to it, was material as evidence for him, and it was so flagrant a violation of the rules of evidence to allow Weare to state its contents, and an error so gross as to entitle the defendant's to a reversal of this judgment.

V. On pages 30 and 31 are our objections and exceptions to Weare stating conversations between himself and Charles H. Hall. There was not in the whole case a particle of evidence that the defendants knew anything about them, nor any pretence that they could or would be connected with the subject matter of them. It was gross error to allow Weare to testify to them.

VI. At pages 32 and 33, Weare was allowed, against our objection and exception, to give the contents of a pretended telegram from Parsons. It appeared from his examination and cross-examination, given on page 32, that he did not know that he ever had it in Chicago, or left it there, nor that he did not know that it was not at his house in Cedar Rapids. He stated that he had not looked for it at home, and it did not appear that the original written message could not have been produced. It was positively certain that, at the office in Cedar Rapids it might be found, and no search had been made for it in the places where it ought to be, and for aught that appeared in evidence, it then was. The contents of that despatch were important and material, and ought not to have been given by the witness until clear and satisfactory evidence was produced of its loss or destruction, without Weare's fault.

VII. On page 34, and top of page 35, are our objections and exceptions to Weare testifying to conversations between himself and McAffee, March 18 or 21, 1869, when neither of the defendants, nor even Charles H. Hall, were present. It was hearsay. It was a palpable, gross and flagrant violation of the plainest rules of evidence to permit him to give those conversations. The evidence was prejudicial to the defendants, the reception of it utterly unjustifiable and absolutely unaccountable upon any theory save

one that we have sometimes heard advanced by judges, "that they were determined to put the case through."

VIII. On page 43, against our objection and exception, Weare was permitted to state what Charles H. Hall said to him about his financial condition, when he first proposed to do business with his Bank. It was clearly incompetent, since defendants had no connection with it, knew nothing about it, and it had nothing whatever to do with the issues in the case. And yet it was lugged into it, and used to the prejudice of the defendants, against all law, against all precedent, and against all right.

IX. On page 37, Parsons was permitted, against our objection and exception, to state what Weare said to him at some time when he was in Chicago, previous to the refusal of the defendants to accept a batch of drafts, among which was one of $5,000. It was clearly error to permit Weare to make statements to Parsons when neither of the defendants were present, and then allow Parsons to testify to them to bind the defendants. To manufacture testimony against them in that way, and produce it to their prejudice, *was a great wrong, a gross error, and utterly unjustifiable.*

1. We submit that each and every of our objections above stated were well taken; that it was error to overrule them, and that most if not all the testimony thus allowed to go to the jury, against these objections, was material, and calculated to prejudice the rights of the defendants before the jury.

2. We shall not insult the dignity of this court by citing authorities from text books, or decided cases, to establish the positions we have stated. The principles governing the cases and for which we contend are elementary. They are so to speak the A, B, C, of the law of evidence, and need nothing more than a bare statement, to obtain the assent of the judicial mind.

3. We submit that it is an error of law, for a judge to trifle with the rights of parties, by systematically overruling legal and valid objections, made in the course of a trial, and allowing evidence to go to the jury in violation of legal rules, and thereby, intentionally or unintentionally, lead them to the conclusion that neither of the parties have any rights which the court *does*, or which the jury *should* respect.

IV.

Defendants held the Affirmative.

Although the defendants pleaded the general issue, yet before the jury were sworn in the case, they withdrew that plea, by leave of the court, and relied upon their pleas of set-off. Page 24 printed, and 77 original record. Thereupon, upon the motion of the defendants, after the jury were sworn, the court ruled that under the pleadings, they were entitled to the affirmative of the issues in the case, and to open and close the case, the judge saying, however, that he might reconsider the ruling after the evidence was in. Printed record 28, original, 88.

The evidence in the case being closed, the court, on motion of the plaintiff, did change the ruling, and gave the plaintiff the opening and close of the argument to the jury. The defendants excepted. Printed record 48, original 143.

We say that the defendants had the affirmative of the issues on the pleadings, and were entitled to open and close the argument to the jury.

1. The plaintiff declared on the two bills of exchange or drafts set out in the special counts, and on the money counts, and on an account stated, and he annexed to and filed with the declaration copies of the two drafts, to be given in evidence under money counts.

2. After the withdrawal of the plea of the general issue, the plaintiffs' case, on his declaration was admitted, and he had nothing to do but to assess damages and sign judgment.

3. Under the statute of set-offs, while the defendants admitted that they owed the money specified in the two bills which they had accepted, they sought by these pleas of set-off, which were in the nature of a cross action, to recover the contents of the draft described in the second plea, or after the general issue was withdrawn, their first plea, against the plaintiff, and to establish the liability of the Bank on the draft described in their third plea, or second after withdrawal of general issue, and to set off the amount of it against the two bills described in the declaration, because, as they alleged, they were originally made to the Bank, and were its property at the commencement of the suits.

4. It is manifest that primarily we had the affirmative of maintaining our pleas and establishing our set off or cross action.

Was that burden changed by the subsequent pleading? It must be remembered that the plaintiff did not by his replications admit our right to this set-off, or our right to recover on our bill or draft, as we did his right to recover on his bills set up in his declaration. He denied our right to recover, 1, because he said the consideration for our bill had utterly failed; 2, because he said it was obtained by the fraud of Charles H. Hall, both of which facts we had notice of, when we took the bill of Hall.

5. Had we been plaintiff in a suit on our bill, he could have given evidence to sustain either of these defences under the general issue. Our pleas contained the allegations that we should have been obliged to embody in a declaration. We set out the making of the bill, described in each plea substantially as we would have done in a declaration. A general denial of the promise and undertaking would have put the pleas in issue—would certainly have put in issue the facts alleged in special plea, or first plea after general issue was withdrawn, so that the burden of proving the consideration for our drafts was primarily and affirmatively upon us. The replications, it is true, set up certain facts, and then said, the consideration for the draft failed in one replication, and in another certain facts were stated, which, it is claimed, showed fraud and covin. We then rejoined setting up the transactions and stating the facts, out of which the draft in each of our pleas arose, showing the consideration, and then the plaintiffs surrejoined with a general denial of our rejoinder, so that by our pleas and rejoinders the affirmative of establishing our set-off and maintaining our cross action was upon us.

6. There can be no question of our right to open and close the argument of the case to the jury, but that right was violated and trampled under foot by the Court, as had been our right to have the case presented to the jury upon competent evidence, notwithstanding our objections and exceptions. That this ruling was erroneous, there can be no doubt.

7. We cannot refrain from the expression of our feeling that throughout the trial of this case, and in the charge to the jury, the defendants were unfairly dealt by, and we hope your Honors will examine the points alleged for error in that light, and relieve them from the burden of this judgment and give them an opportunity to

try the case again, when they hope the errors of the former trial may be avoided.

V.

Exceptions to the Charge.

The charge begins at page 48, printed record, and is divided into Paragraphs numbered from 1 to 19 inclusive. We shall refer to the parts of it by numbers.

Want of Consideration.

I. No. 1. At the outset the Court told the jury, as matter of law that, the main, if not the only questions in this case were as to the *validity* of the draft of the First National Bank of Cedar Rapids, set up by the defendants in offset. The defendants excepted to that instruction.

2. A careful review of the testimony will show that, that was one question, *but it was neither the main nor only question.* We proved clearly by the testimony of J. Sherman Hall, William J. Pope and Charles H. Hall, and a telegram from Walker, the President of the Bank, that, after payment of this draft had been stopped; after Charles H. Hall and Weare had come from Cedar Rapids to Chicago; after the Bank had attached all Charles H. Hall's property, and when all the facts were known which the plaintiff relied on to prove failure of consideration of this draft, or that it was procured by fraud, it was agreed between J. Sherman Hall and the Bank that the defendants should pay the drafts of Charles H. Hall on them, and accepted by them, and which the Bank then held, amounting to $9,000, two of which were the drafts described in the declaration, and that the Bank should pay this $4,500 draft, or receive it in payment of one-half of the $9,000. We also proved that, the defendants performed their part of this contract, by paying $4,500 in money, and offering to deliver this $4,500 draft in payment of the other $4,500, or to pay that, if the Bank would pay the draft set up in offset.

3. J. Sherman Hall states this agreement at printed page 44, commencing at the middle of page 131 of original and continuing to near the foot of page 132. He says: "On Monday, the 22d, had an interview with Walker, President of the Bank, Weare, and Blair, one of the directors. I told Mr. Walker before anything was

done, so far as our firm were concerned, if the Bank would pay the $4,500 draft, we would pay our acceptances amounting to $9,000. He said they had decided to do that, that was fair, and turned to Mr. Weare and asked him if that was satisfactory to him. I told him that so far as my brother was concerned, he must make his own arrangements. My brother proposed to give them McAffee's notes, and all his property, his life insurance, &c. We separated to see what my brother could do to secure the balance of his indebtedness. I told them when they proposed that we should endorse my brother's paper, that I could make no arrangements to do so without seeing my partners; that that part would be out of the question. We met again in the afternoon. My brother had not been able to get any one to secure his paper, and they declined to release the attachment and take McAffee's note. I then asked Mr. Walker how it was about our agreement, so far as our firm was concerned. He said that was all right; they would carry that out, and had or would telegraph to Chicago to have it done; for us to pay our paper, and they pay theirs. I told him we would pay our acceptances at the same time. I telegraphed to Mr. Pope the arrangement I had made. I remember the telegram from Walker dated March 23d, testified to by Mr. Pope. It was "*on my way west. I desire arrangements made at Cedar Rapids carried out.*"

4. Charles H. Hall testified to this agreement; the bill of exceptions does not give his words for the sake of brevity, but the statement of his testimony is on page 46 printed, and foot of 136, and top of 137 original. "He testified to the interview with Walker Weare, and Blair testified to by Sherman Hall and stated it substantially as he has."

5. Pope's statement is at page 41 printed, 128 original, and as follows: "When payment on the $4,500 draft was stopped," (this was done by Weare by telegram to Parsons to not pay; printed page 33,) "there were acceptances of ours of Charles H. Hall's drafts, amounting to $9,000—two of them were the acceptances in suit; the others matured on the 17th. I had received from Sherman Hall notice of an arrangement made between him and Mr. Walker, at Cedar Rapids, by which we were to pay the $9,000, and the Bank was to receive the $4,500, or pay it, we paying ours. I went to Mr. Dent, one of the plaintiffs' attorneys, and offerred to carry out the arrangement; he told me he had received a telegram from Cedar Rapids in Walker's name, not to

do it. I sent a telegram to Mr. Walker that the arrangement was refused here, He telegraphed back from Marshalltown, Iowa: "On my way west. I desire arrangement carried out," signed "W" or "W. H. Walker." I had that telegram in my hands when Dent told me he had been telegraphed to from Cedar Rapids. Think he said signed by Walker not to carry it out. I paid $4,500 of the $,9000 March 22nd or 23rd."

II. Immediately after that part of the charge above referred to, the judge said:—

No. 2. The issues are under the pleading as follows:

First. That the consideration for the said draft has wholly failed, of which the defendants had notice at the time they received the same, and that it is not now a valid demand against the said plaintiff, in the hands of the defendants.

Second. That the said draft was obtained from said Bank by certain fraudulent acts of the said Charles H. Hall, of which the defendants were cognizant at the time they took the same, and that said draft is void in the defendants' hands, by reason of said fraud. If either of these issues are found for the plaintiff, he will be entitled to recover.

The defendants excepted to that part of the charge. See original, page 144, print bottom 48 and top 49.

1. Of course this is not a true statement of the issues in the case—of the matters to be passed upon and considered by the jury—nor of the law of the case.—even if these issues had been found for the plaintiff, he was not entitled to recover, unless the jury also found that, the arrangement testified to by Charles H. Hall and J. Sherman Hall as having been made at Cedar Rapids, and corroborated by the testimony of Pope, and offered to be carried out by him, and under which he paid $4,500, and offered to pay the other $4,500 if the Bank would pay its draft of $4,500, or receive it in payment. Pope paid this $4,500 under that arrangement, the Bank received the money, but refused, by its attorneys in Chicago, to pay its draft, while the President was telegraphing that he desired the arrangement carried out.

The offer of Pope, and Walker's telegram, constituted, in law, a payment of the acceptances sued on. It, in effect, was an application of the draft of the Bank to the liquidation and discharge of the indebtedness of the defendants to the Bank, made by

the parties themselves; and the fact that the attorneys in Chicago did not exchange the paper, does not alter the effect in law. If the agreement, as we claim it, was made at Cedar Rapids, what was done in Chicago was in law a performance of it by both parties, and it was an important question for the jury to pass upon. If they had not been told throughout the charge, substantially that, ~~there~~ there was no such question for them to consider, but had been directed to consider it, and find whether there was such an agreement made, they would have found that there was. Had they so found, the question of want of consideration or fraud would have dwindled into insignificance.

2. We had not only alleged the promise to pay this draft in our plea, which allegation was not traversed, but we made proof of it. Such a promise was valid, and binding. It waived the failure of consideration and fraud if either existed, and whether it was made or not, ought to have been submitted to the jury as a question of fact to be found by them. Indeed, they ought to have been told that, the fact being admitted by the pleadings, the defendants were entitled to the amount of the draft with interest, and the five dollars costs of protest, and five per cent. damages; and therefore that they would certify in their verdict any excess over and above the amount of the two drafts declared on, in the defendants' favor.

3. It must be remembered that when this arrangement was made, all the property of Charles H. Hall was in the hands of the sheriff, under an attachment in favor of the Bank, in its suit against him, brought upon the $5,000 draft drawn by him on the defendants, March 16, 1869, and discounted by the Bank at the same time the Bank gave him the $4,500 draft in controversy; (the $5,000 draft, which plaintiff claims was the consideration on which the Bank gave this $4,500 draft set up in off-set,) which property McAffee had bought for $10,400 and given his note of $12,400. It must also be remembered that in that suit, the Bank subsequently recovered judgment against Hall and collected over $4,000 of the contents of this very $5,000 draft. See bottom page 35, and top of page 36 of printed record, and John Weare's testimony at page 34, printed, and about middle of original page 104, where he says, "the Bank has received from sale of Charles Hall's property, seized under the attachment, a little over $4,000."

4. In the arrangement, the defendants waived any claim they

might have, to have any of this property applied to the payment of the $9,000 which they had accepted, or the $12,237.87 which Charles H. Hall owed them March 17th, 1869. But this fact and this evidence, the Court, by so much of the charge as we have already referred to, withdrew from the consideration of the jury, and told them, that the only question in the case was the validity of the draft, and upon that question the only questions were, had the consideration failed;—was it procured by the fraudulent acts of Charles H. Hall—did the defendants have notice. And then told them that, if they found either of these issues for the plaintiff, he would be entitled to recover on the drafts declared on.

5. There is nothing in the whole charge alluding to this subsequent promise. The Court, in the charge, withheld it from the consideration of the jury, directed them to consider only the failure of consideration and fraud, and almost the last words from the Court, which fell upon the ears of that jury, and which they took with them to their room as they retired, (at the conclusion of the charge, which was the strongest and most effective argument for the plaintiff that was made in the case, and in which the jury were almost, if not quite, told to find both the issues for the plaintiff,) were: "*you may find one or both these issues for the plaintiff, if you shall consider the proof sufficient; but either will be sufficient to entitle the plaintiff to a verdict on the drafts declared on.*" No. 16.

III. No. 3. The Court told the jury, in this part of the charge that, if it were proved to their satisfaction, that the Bank drew this draft upon the faith and consideration of the agreement between Weare and Charles H. Hall, that his draft on the defendants, of the same date, should be accepted by them and security given for the payment thereof, *and upon no other consideration;* that it had not been accepted and secured nor paid, and that defendants had notice, at the time they received it from Charles H. Hall, of the agreement and consideration, they would be justified in finding that failure of consideration had been made out by the proofs.

Then further on, in No. 8, the same thing is repeated and reference is made to the letter from Charles H. to defendants enclosing the $4,500 draft, and then it says: "but all agree, I think, that the letter did in plain terms notify the defendants, that he, Charles H. Hall, had that day drawn a draft for $5,000 on them, and that they were expected to accept the same, and put up collaterals,

Then in No. 9 the charge tells the jury to consider "that the day before this draft was made by Charles H. Hall, on the defendants, said Charles H. Hall had, in the office of the defendants, in Chicago, made a sale of all his grain in store in Cedar Rapids, to McAffee, *and that there would seem to be no resources belonging to the said Charles H. Hall, with which to indemnify* the defendants for this acceptance which he had made on them. You are to pass upon the pregnancy of the facts and circumstances bearing upon the manner in which Charles H. Hall had dealt with the Bank, and also with the defendants, and decide from all the evidence on the point, whether Sherman Hall and Pope did know or had sufficient notice and information on the subject, to be equivalent to actual knowledge, at the time this Bank draft came into their hands and was placed to Charles H. Hall's credit, that this draft was made by the Bank, upon the agreement and consideration that the defendants were to accept and secure said draft of $5000; and I believe there is no pretence that it has ever been so accepted or paid."

Then further on, in No. 14, the jury are told that the plaintiff is entitled to a verdict upon the issue of failure of consideration, if they are satisfied, by the proof or a preponderance of it, of the facts stated in it and numbers 3, 8, and 9. We call attention to it for the language, without repeating it here.

Then, in No. 16, the jury are told that if they find this issue for the plaintiff, he will be entitled to recover on the drafts declared on.

Each of these parts of the charge were excepted to. We proceed to state the grounds of exception.

1. In these several parts of the charge, the question submitted to the jury is, *whether that $4,500 draft was issued by the Bank upon no other consideration than the agreement of Chas. H. Hall, that the defendants should accept that draft and secure it.*

2. We say the evidence did not warrant the court in submitting that question to the jury. There is no evidence on the record from which the jury could be warranted in finding that that was *the only consideration.* Nobody has testified to any such thing; nobody but the court has suggested it.

3. John Weare and Charles H. Hall are the only witnesses who testify to the transaction of March 16, 1869. Weare's testimony on that subject is on page 31, printed—at the foot of the page

and 97 original record. Read it, and you will not find one word about the defendants accepting that draft, nor does he say that Hall agreed that they would accept that particular $5,000 draft, or put up the collaterals to secure its payment. It does not appear at all from Weare's testimony that that transaction was different from an ordinary discount of a draft. True he asked Hall about collaterals to drafts drawn or to be drawn. He says Hall told him that had been done; that he fixed that before he left, *and the whole batch* of $13,000 had been accepted. He also asked Hall how much grain he had, and Hall told him 19,000 of oats, and 12,000 of corn and wheat each, worth $20,000 to $21,000. But there is nothing to show that the *only consideration* upon which Weare discounted that draft was an agreement that the defendants should accept and secure the payment of it by collaterals, or at all. Nothing to show or warrant the court or jury in finding that *Charles H. Hall's personal liability and responsibily* were not *some consideration* for the discount of his draft. On the contrary, the fact that, before they went to Chicago, on March, 13, Hall had taken him through his warehouse, and showed him the grain in it, *till his head swam*, that Hall, on the 16th, in reply to Weare's question, told him he had 45,000 bushels of oats, corn, and wheat, worth $20,000 to $21,000, show that *Charles H. Hall's responsibility and liability formed a part, if not all the consideration for discounting this draft.* Of course the draft itself was an agreement, on Chas. H. Hall's part, that Sherman Hall and Pope would accept the draft. That agreement is contained in every bill of exchange, but there is no evidence of any special agreement that they should do so, beyond what was contained in the draft itself. So wo repeat, Weare does not prove that, but for the special agreement that defendants should accept and secure the payment of that draft, he would not have discounted it, and given Charles H. Hall the $4,500 draft.

4. CHARLES H. HALL, at page 45, printed record, says he did not tell Weare that the drafts of 11th and 12th had all been accepted and collaterals put up—told him all had been accepted that had been presented, but those had not been presented. Did not tell him collaterals had been put up, but did tell they would be to all accepted hereafter.

5. Charles H. Hall had made arrangements to furnish $12,400 of collaterals, by McAffee's notes, and therefore knew that they would be put up. He says he told Weare that $4,500 of his

drafts became due on the 17th—the next day, and he wanted the money to send to Sherman Hall & Pope, to meet it. Weare turned to his book and found that to be the case, discounted the $5,000 draft, signed the $4,500, and handed to him over the counter. But in the testimony of Hall there is nothing to warrant the jury in finding that Charles H. Hall's *responsibility and liability created by this $5,000 draft, formed no part of the consideration for discounting it*, nor that that draft alone was no consideration for the $4,500 draft. It is evident that the fact that $4,500 would be paid in Chicago the next day and placed to the credit of the Bank there, was also a consideration and an inducement moving Weare to discount the draft.

6. Again, we may as well say here that, the Bank retained this $5,000 draft after it had stopped payment of the $4,500 one, and before this suit was commenced, had brought suit, and before it was tried had recovered judgment upon it, and collected over $4,000 of the money secured by it. This is further and conclusive evidence that that draft was at least *a* consideration—*some consideration*—for discounting it, and for the $4,500 draft which we are attempting to set off in this suit. It was therefore error to charge the jury that they could find from the evidence that *the only consideration* for the $4,500 was the agreement of Charles H. Hall that the defendants should accept and secure the $5,000.

7. It was also error to tell the jury that they might find from the evidence that the consideration for the $4,500 had wholly failed. There was no evidence to warrant such a finding.

1. The undisputed evidence in the case is, that the defendants had from time to time accepted Charles H. Hall's drafts on them, and March 17th, 1869, the day they received this $4,500, the same amount of acceptances became due. That this draft was sent to them to put them in funds to pay these acceptances. When they received it they credited it on their books to his account. See Black's testimony page 36, original 110; Hubbard's original, page 111; George Gooch's original 124, as well as the testimony of plaintiff and defendant.

The following cases decide that one who takes negotiable paper in payment, or as security for a precedent debt is entitled to be protected as a *bona fide* holder for value.

Swift vs. Tyson, 16 Pet., 1
Manning vs. McClure, 36 Ill., 490.

Hancock vs. Hodgson, 3 Scam., 329.
Corning vs. Vail, 31 Ill., 166.
Foy vs. Blackstone, 31 *id*, 533.

2. If the consideration on which the draft was issued by the Bank to Charles H. Hall was good and valuable, and had not wholly failed when that draft was received by the defendants on the morning of March 17th, 1869, and they received it upon a good and valuable consideration, either for an antecedent debt, or to indemnify them for their acceptances due that day for the same amount, then no subsequent failure of the consideration for the draft would affect it in their hands

3. There is not a particle of evidence that the consideration had wholly failed, before the defendants received the draft. So that if the charge meant to submit the question, whether the consideration had failed before the draft was received by the defendants, then there is no evidence from which they could find that it had. If it was meant by the charge, if the evidence satisfied the jury that, there had been a failure of the consideration after the defendants received the draft, then it is erroneous, because there was no evidence to show that they did not receive it upon a good and valuable consideration; nor that they could not have maintained suit to recover its contents as *bona fide* holders, at any time before actual failure of consideration. Hence no subsequent failure would affect the paper in their hands.

4. There is no evidence tending to prove that the consideration has ever failed.

We have clearly shown that, Charles H. Hall's draft of $5,000, and his individual liability on it, was *a* consideration—*some consideration*—for discounting it, and *a* consideration for the $4,500 draft. It is conclusively proved by the plaintiff himself that, that part of the consideration has not wholly failed, because the Bank has not surrendered it, nor offered to surrender it. While it has refused to pay its draft, and attempts to avoid it, it not only retains Hall's draft for a larger amount, but affirms its binding force against Hall and his personal liability upon it, by bringing an action against him to recover its contents, recovering judgment upon it, and actually collecting over $4,000, out of the property of Charles H. Hall. Talk about failure of consideration! attempt to sustain those parts of this charge! Tell the jury that under the rules of law applicable to this case they are at liberty to find that the consideration of

this $4,500 draft has *wholly failed!* Say that the Bank can repudiate its promise to pay this draft, and still enforce the $5,000 draft against Charles H. Hall by action, judgment and execution; that it can rescind this $4,500 draft, and not place Charles H. Hall in the same situation he was in before either were made? The bare suggestion shows how erroneous the charge was, and how far the defendant's rights were prejudiced by these palpable and flagrant errors of the Judge. Has Charles H. Hall's individual liability on that $5,000 ever been determined, or has his promise failed so as not to be binding upon him, or had his liability ceased or promise failed on March 17th, 1869? Has the Bank returned to Charles H. Hall the money collected from his property by execution on the judgment it has recovered against him? Has it discharged the judgment so that it cannot enforce it against his property at any time? On the contrary, is he not still liable for any balance of that judgment now unsatisfied, and may not the Bank collect it any day by execution and seizure of any property he may have? If it had done so, it would be no defense to the draft in defendant's hands. The truth and the law is' that when the Bank issued that draft, it received a good and valuable consideration for it; one that could not fail except by the act of the Bank and Hall. One that had not failed when the defendants received the draft and passed it to the credit of Charles H. Hall, and admitting that the letter enclosing it to the defendants, did notify them that he had drawn on them for $5,000, favor of Weare at 15 days date, and that Weare expected them to accept and secure it with collaterals, and admitting that that promise was the consideration for the $4,500, the defendants did not know and could not know that that promise was not still binding on Charles H. Hall, nor that the $5,000 draft was not a valid obligation against him; nor did they nor could they know that the draft would not be accepted by them and secured by collaterals when presented. If they gave the matter any thought, they expected to accept and put up collaterals, because they knew that Charles H. Hall expected to provide the collaterals.

8. It was error to tell that jury that, it was proper for them to consider that, because of the sale to McAffee, "there would seem to be no resources belonging to the said Charles H. Hall, with which to indemnify the defendants for this acceptance which he made on them," as the court did tell them in No. 9, of charge. It was a grossly erroneous representation of the facts proved; for, all the evidence on that subject shows that the sole purpose of making that sale, was to enable Charles H. Hall to comply with

Wear's requirement, and put collaterals in the hands of Sherman Hall and Pope, to be placed with Parsons as security for their acceptance; and that if McAffee made the purchase, his notes were to be sent to them for that purpose. The sale was not made in defendants office, but was talked of there, and was made after McAffee had gone to Cedar Rapids and looked over the grain. It was made for $10,400; he gave his notes for $12,400. Hall and Pope paid his draft on them of $2000; and also gave him a guaranty that the property which he bought was worth $10,400, for the sole purpose of aiding Charles H Hall to furnish the collaterals for them to put up as security with their acceptances. They really made themselves responsible for the whole $12,400. Yet this evidence is all perverted by the court, and made to prove that all Charles H. Hall's property was diverted from the defendants, and that, because the negotiations for the sale were begun in their office, the jury might assume that, it was a scheme devised to defraud the Bank. Why, Pope and Hall both swear that they were to have this McAffee paper to put up with their acceptances as collateral, and that they know of no reason why they would not have accepted the $5,000 draft, as well as the drafts of 11th and 13th of March, if payment of $4,500, draft had not been stopped by Weare's telegram to Parsons.

9. It was error to tell the jury, as the court did, at the end of No. 9 of charge, that there was no pretence that this $5000 draft had been accepted or paid. We have shown, and referred to the testimony of John Weare and the Bills receivable Book of the Banks to prove it that over $4000 of it had been paid out of Charles H. Hall's property.

10. It was error to tell the jury that, the letter from Charles H. Hall to defendants; informed defendants that they were expected to accept it and put up collaterals, and that they might find from that, and other facts and circumstances in evidence that, the defendants were informed that, that $4,500 draft was made by the Bank on *the* consideration of Hall's agreement that they should accept it and secure it, and then to tell them that if they did not do it, and the draft had not been paid, they might find that the consideration had wholly failed, and should find a verdict for the plaintiff upon the drafts declared on.

The letter and draft told them they were to get at least $4,500 in money for their acceptance, but Weare deprived them of that by stopping its payment, and deprived them of McAffee's

notes to use as collaterals by breaking up the sale to McAffee.

11. It was error to leave the jury to find from the evidence that the failure of the defendants to accept and secure that draft for $5,000, would effect a failure of the consideration of the $4,500 draft, when the evidence was uncontradicted that the plaintiff had stopped payment of the latter before the former had been presented.

12. There is one other fact in this connection which we think is conclusive upon the issue of failure of consideration and the correctness of the charge of the Court, and shows beyond all controversy that the agreement between Charles H. Hall and Weare was not the *only consideration* for the $4,500 draft.

John Weare in his testimony, at original paging 93, was permitted, against our objection, to testify to the contents of a letter from Sherman Hall & Pope to Charles H. Hall, in which he says they said: "You are connected with the First National Bank of Cedar Rapids, and you can make an arrangement with them whereby you can draw on us and get an extension of your line of discount that will answer your purposes. *We will accept as we have done and will pay.*" Again at original paging 102, he says, that in the interview in defendants office, March 17, "Sherman Hall came forward to talk to me; I asked if anything had happened. *Has not your brother a right to draw these drafts? He said yes.* I said, is there any reason why these drafts are not paid. He said, we will fix this thing up, there will be no trouble about it." Now if these statements be true, it is absurd to suggest that, Charles H Hall's agreement was the *only* consideration for this draft, for the Bank had the agreement of the defendants to accept, and pay Charles H. Hall's drafts on them, and that agreement was as good to the Bank as an actual acceptance, and was also *a consideration* for discounting this $5000 draft and for the $4500 draft. The defendants are liable to pay that $5000 draft, just as much as if they had accepted it. The Bank retains it, and has their agreement to accept and pay it, because there is no pretence that Sherman Hall and Pope had ever notified the Bank, that they would not accept Charles H. Hall's draft. This fact the court withheld from the jury, by telling them if they found certain facts, of which this formed no part, then they would be justified in finding the issue of failure of consideration for the plaintiff. This promise was a consideration, and the jury could not find that the consideration had wholly failed, or that there was no consideration for the

$4500 draft, but Charles H. Hall's agreement, that defendants should accept and secure the payment of his $5,000 draft. If, however, that were so, then the consideration has not *wholly failed.* Charles H. Hall's promise has not failed. That remains in as full vigor as when made.

13. We humbly submit that, the whole charge, on this question of failure of consideration, is incorrect in its statement of the evidence and erroneous in stating the rules of law, which, it attempts to apply to the facts proved by the evidence. That it mislead the jury, diverted their attention from the real evidence in the case, and withheld from their consideration, important and material facts proved, and thereby produced a verdict unsupported by the evidence or by law.

14. If the jury had been left free to examine all the testimony in the case, and not been led astray by the arguments and suggestions of the court, they could but have found that, the consideration for our $4,500 draft *had not wholly failed;* They must have found that, the only reason why the $5,000 draft was not accepted and secured, was because the bank had stopped payment of the $4,500 draft. Hall and Pope, and Charles H. Hall, all swear that McAffee's notes were to be used as collaterals, and Pope and Hall say *they know of no reason why they should not have accepted the $5,000 draft if the Bank had not stopped payment of the draft.*

15. We submit that it is not law that, a Bank can discount a draft, give the drawer credit for the proceeds on its books, receive his check for part of those proceeds, and pay that check with a draft or bill of exchange, and then, before that bill of exchange can be presented, stop its payment, and claim that the consideration for it has failed, because the drawee in the discounted draft, does not accept it after such stoppage of payment, and for that reason.

IV. But the charge is erroneous for a further reason:

1. The jury were not instructed that, if they believed from the evidence that, the defendants, *when they received the draft, had notice that the consideration had failed,* they would be justified in finding the issue of failure of consideration for the plaintiff. But they were told that, if they had notice of the consideration for the draft, that is; if they had notice of the agreement between Charles H. Hall and the Bank, that they should accept the $5,000 draft and put up collaterals to secure it, and did not do so when it was pre-

sented, after the time when they received the $4,500 draft, and after Weare had stopped its payment, they would find the issue of failure of consideration for the plaintiff. (See Nos. 3, 8, 9 & 14 of charge.)

These instructions, in effect, told the jury that, if the defendants had notice of what the consideration for this draft was, when they received it on the 17th of March, and gave Charles .H Hall credit for it, notwithstanding that consideration was good and valuable, and had not then failed, and notwithstanding the draft was then a valid and binding obligation of the Bank or of Weare, yet, if the defendants did not, after Weare had stopped its payment, upon the presentation of the $5,000 draft on the 18th of March, at the time negotiations were pending between the defendants and Weare for a settlement of the whole matter, the $4,500 draft and the $5,000 draft included, when they—Weare and J. Sherman Hall—were preparing to go to Cedar Rapids to see what could be done there, and whence they did go that afternoon, accept the 5,000 draft, and put up collaterals, then they were chargeable with notice on the 17th, when they received the $4,500 draft, that they would not accept the $5,000 draft when it should be presented, nor secure it with collaterals, and so were not *bona fide* holders for value, and could not recover the contents of their draft, in offset, to the acceptances counted on in the declaration.

3. Now it is conceded by all the parties, that the defendants received the $4,500 draft on the morning of March 17th; that they gave Charles H. Hall credit for it; that they deposited it with their banker at once, and it came back through Clearing House with notice that its payment had been stopped; that John Weare stopped the payment by telegram to Parsons on the 16th March, before the defendants could have received it. The contents of the letter enclosing it are in evidence. The $5,000 draft did not reach Chicago till after payment of the $4,500 draft had been refused, and was not presented till the 18th March, while John Weare was in Chicago, or after he and J. Sherman Hall had started for Cedar Rapids, nor till after Weare knew by telegram, received while he was at dinner with defendants, that all the grain and property of Charles H. Hall had been attached at the suit of the Bank at the Cedar Rapids, and then the defendants refused to accept it.

4. Admit for argument sake that the consideration for the $4,500 draft has ever failed, it had not failed when the defendants re-

leived it; and it did not fail until the $5,000 draft was presented to the defendants for acceptance and they refused. Of course we say it never did fail, it was not the actual acceptance of that draft by the defendants, and its security by collaterals, that was the consideration for the $4,500 draft, but it was Charles H. Hall's agreement or promise that they should accept, contained in the draft, and if they did not, that he would protect the draft and pay the contents of it to the Bank or Weare, and the further promise of Hall that defendants should put up collaterals as security (admitting that to be the agreement), that was the actual consideration, *in presenti*—Charles H. Hall's promise and agreement has never failed, they are in full force and binding upon him. He has failed in keeping and performing his promise and agreement, if you will, except in so far as the Bank has enforced its performance, by suit, judgment and execution; but the promise itself is binding upon him, with all the force and efficacy that it had when made. The Bank holds him to it, with a vice like grip, and has never offered to cancel it, or release him from it.

5. But the court in the charge, after having told the jury that, if the defendants had notice of the agreement, that they should accept and secure, when they received the $4,500, and gave Charles H. Hall credit for it; and if they did not accept and secure when the draft was presented, and under the circumstances with which the Bank had surrounded the transaction, they would find the issue of failure of consideration for the plaintiff, and assess his damages for the amount of the acceptances sued on; further told them that the letter, enclosing the $4,500 draft, did notify the defendants of the agreement, which was the consideration for the draft, and that there was no pretence that it had been accepted or paid. There was no question of fact left for the jury to pass upon. The court told them what facts, if found by them, would defeat our off-set, and then told them that there was no dispute about the existence of those facts, being proved by the evidence. All the jury had to do was to put their verdict in form and sign it, and the work was complete. They were relieved of the duty of reconciling contradictory testimony, or determining the credibility of witnesses or passing upon or settling disputed facts. The defendants went out of court, with the loss of the money they were entitled to by the law, and under the evidence, and which the Bank had promised to pay them, after the controversy began, and all the facts upon which it relied on the trial, to defeat the defendants,

were fully known to it, a promise upon good consideration, the conditions of which the defendants at once performed on their part.

6. The rule of law laid down by the court, and upon which the verdict was returned is, that if an endorsee for value, of commercial paper, have notice of its consideration, when he receives it, and the consideration afterwards fails, such failure constitutes a defence in his hands; that he is chargable with notice of failure of consideration before hand, although when he receives the paper, the consideration is good and valuable, and the paper is without infirmity or "without spot or blemish or any such thing." This is not the law. The charge was erroneous, and the verdict a wrong and a hardship, from which the defendant ought to be relieved.

16. We have thus gone over the charge on the issue of failure of consideration. We think we have demonstrated that the plaintiff had utterly failed to produce evidence tending to sustain that issue, and that it was error for the court to tell the jury that, in any event, under the pleadings and evidence, they would be justified in finding that issue for the plaintiff, or that, if they did find it for the plaintiff he would be entitled to recover on the draft declared on.

1. The plaintiff had proved that Charles H. Hall gave the Bank his draft on the defendants for $5,000; that the Bank discounted that draft, charging him the interest at 10 per cent from its date to maturity, and the premium for exchange between Cedar Rapids and Chicago, and gave credit to Charles H. Hall on the Bank's Books for the net proceeds.

2. That simultaneously with the discount of that $5.000 draft, Charles H. Hall drew his check on the Bank for $4,500, which check was paid by this Bank draft of $4,500.

3. That so early as November, 1868, Charles H. Hall had received from the defendants a letter—contents given at page 30 printed record—in which they had authorized him to draw on them through the Bank, promising to pay and accept as they had done, which authority and promise had not been revoked when the $5,000 draft was discounted.

4. That the Bank had not only retained the $5,000 draft on the defendants, and Charles H. Hall's check, both of which were promises on his part to pay the Bank at least the $4,500; but the Bank had brought suit to recover the amount of the draft, and did

actually collect by that suit over $4,000, from the property of Charles H. Hall. The very property that the defendants were to have had the proceeds of, to indemnify them for their acceptance of this very draft.

5. We repeat that these things were *some consideration* for that $4,500; that being proved by evidence introduced by the plaintiff, there was no evidence tending to show that the consideration for that draft had *wholly failed;* and that, in order to defeat our set off, under the pleadings, and under the law it was indispensable for the plaintiff to show a total failure of consideration. It being proved, therefore, by the plaintiff's evidence, that there was some consideration for that draft; that the Bank, the owner of the drafts declared upon had received in money, from that consideration over $4,000, the plaintiff, who had not a dollar of interest in the drafts declared on, could not in any event recover the whole amount agreed to be paid by them.

6. The court by the charge withdrew from the jury all consideration of the fact of the arrangement and agreement between the Bank and the defendants, by which the defendants agreed to pay their acceptances $9,000, of which the drafts declared on were two, and the Bank agreed to pay this $4,500, or receive it as payment on the defendant's acceptances, which agreement had been performed by the defendants.

7. If the charge be erroneous in this behalf, the judgment must be reversed.

1. Because it cannot be said that but for these erroneous instructions the jury would have found *the* "*issues*" for the plaintiff.

2. The charge on this issue may have mislead the jury in considering the facts relative to the issue of fraud.

3 If the jury had been left to find and had found that the consideration had not failed, as we have no doubt they would had they not been so erroneously instructed, of course they could not have found for the plaintiff on the issue of fraud, because they could but have found that the Bank had recovered over $4,000 in money, and had not sustained any damage, even if Charles H. Hall had acted ever so fraudulently.

4. To defeat our set off on the ground of fraud, there must have been fraud and damage combined :

Pasley vs. Freeman, 3 Tenn. Rep., 51.
Eyre et al vs. Dunsford, 1 East, 518.
Haman vs. Alexander, 5 Bos & P, 241.
Upton vs. Vail, 6 John Rep., 182.
Addington vs. Allen, 11 Wen., 374.

And even if the jury had found that there was fraud, they could not have found that the Bank or the plaintiff had sustained damage to $4,500, because they must have found that it had recovered over $4,000 out of the consideration for the $4,500 draft. So that, in any event, the jury must have allowed our set off to $4,000 and over.

That neither the Bank nor Weare could set np failure of consideration, even if Charles H. Hall were sueing on the $4,500 draft, without surrendering to him, to be cancelled, the $5,000 draft drawn on the defendants. See—

Linton *vs.* Potter, 31, Ill. 107, where it is held that where the consideration of a promissory note made by the defendant to the plaintiff was the sale and delivery of personal property, to which the plaintiff had no title, the defendant could not set up want of consideration while he retained the possession. The court say the implied warranty, of title to the property, would enable the defendant to recover its value, if taken from his possession.

Farlin *vs.* Lovejoy, 29 Ill. 45, was a case where Lovejoy drew his bill on Terrell for $3,600, and at the same time executed his note to Clark. The Bank discounted the note, and took the draft for collection, and was to apply the first moneys collected on it to the payment of the note. Farlin, one of the members of the banking house, sold the draft before maturity, and applied the proceeds to his own use, and afterwards agreed to give up the note as paid, but never did. Lovejoy brought suit and recovered judgment, against Mosely and Farlin, the Bankers, for the moneys received on the sale of the draft, without deducting the amount of the note. Held, that having elected to take his judgment without deducting the amount of the note, Lovejoy must pay the note.

The doctrine that if one would rescind a contract, he must place the other party to it in the same situation he was before it was made, is familiar, and applies to the case under consideration.

Charles H. Hall's draft on the defendants, was at least a part

of the consideration for the $4,500, and his promise that they should accept and secure his draft, completed the cousideration. The $4,500 draft was obtained expressly to meet the same amount of drafts due the next day. The Bank retains the the $5,000, sues aad recovers judgment for the amount of it against Charles H. Hall, recovers the amount of the two acceptances, which the $4,500 draft was expressly given to meet, and yet claims to rescind its part of the contract, and by this verdict actually makes Charles H. Hall liable to the defendants, for the money which the Bank has recovered from him on his $5000 draft. That this is contrary to law, see—

Buchanan vs. Horney, 12 Ill., 336.
Jennings vs. Gage, 13 id,. 610.
Hogan vs. Weyer 5 Hill, 389.
Voorhees vs. Earl, et al 2 *id*, 288.

ISSUE OF FRAUD.

V. On the issue of fraud, in No. 4, the court said: "If you shall find from the evidence in the case that, there was an understanding, or collusion between Charles H. Hall and the defendants, that, Charles H. Hall should obtain said draft from the Bank, upon the faith and representation that, the $5,000 draft of said Charles H. Hall on the defendants of the same date, would be duly accepted and collaterals put up to secure its payment, and that at the same time it was well understood between Charles H. Hall and the defendants that said $5,000 draft would not be accepted, nor securities put up, then you will be justified in finding that issue for the plaintiff."

1. Search the record from beginning to end—apply to the examination the severest scrutiny, aided by the strongest microscopic power, and you cannot find a letter or syllable or word to warrant the court in submitting it to the jury to find those facts, or the jury in finding them. Why, there is nothing to show that, the matter of procuring a $5,000, or any other draft, to be discounted, had been alluded to by Charles H. Hall, or the defendants, or that there was any understanding that Charles H. Hall would or should apply to the Bank for any such discount. Nothing to show that that there was any conversation, understanding or collusion between the defendants and Charles H. Hall, that he should make

any representations to the Bank, or that any draft should be drawn on them and discounted, and that they should not accept it or put np collaterals to it. The whole thing is a creature of imagination.

2. The only evidence on this subject, except what the defendants say, is that, there were drafts becoming due of $4500 on the 17th, that it had been Charles H. Hall's custom to send money to defendants, and of the Bank to discount his draft on them, and give him its draft on the Third National Bank of Chicago, to meet and pay maturing acceptances, if the defendants were not in funds to meet them; that the matter of furnishing collaterals had been the subject of negotiation, and the defendants had positively refused to furnish any themselves, and had told Charles H. Hall that if collaterals were put up he must furnish them; that Charles H. Hall had made an agreement with McAffee, to buy his grain, &c., on time, and thus enable him to furnish the collaterals for defendants to put up. Arrangements were so far made that, if McAffee determined to buy, after examining the property, the defendants were to have his notes to use as collaterals to their acceptances, and that to enable Charles H. Hall to make this sale, Hall and Pope agreed to guarantee the value of the grain to be $10,400; and actually paid McAffee $2000 to make the notes up to $12,400

3. Pope, on original page 121, says, "When Charles Hall left here on the night of the 15th March, I did not know he contemplated a loan on the First National Bank on the next day. I was not aware that he was, or intended to make any representations to John Weare with reference to collaterals, or anything else for the purpose of procuring a loan. There never was any conversation between us as to his making any representation for any purpose. I did not know that any had been made by him, when he procured the discount of the $5000 draft, or ever heard of it, till I heard it on the trial of some of these cases; Weare said nothing about it on March 18th, nor any complaint to me, or in my hearing."

Pope's statement about the McAffee trade is on original pages 119 and 120.

4. J. Sherman Hall's statement of the McAffee transaction, and as to the understanding about procuring a loan, making representations &c., is on original pages 126 and 127. He says, among other things "I had no conversation as to his making any addi-

tional loans of the Bank; did not know he contemplated any. He said nothing to me about it. Weare said nothing about any agreement to put up collaterals, in his interview with defendants at their office, March 17. He does not pretend that he told the defendants there was any agreement that they should accept or secure. His whole statement of the conversation is given on original pages 102 and 103, and he does not once mention collaterals to them, in all that conversation. We say there is not a circumstance to contradict, Hall and Pope, in what they say on this subject, and John Weare's testimony corroborates them.

VI. There is nothing to justify the court, in telling the jury what it did in No. 6, of the charge; particularly these words, "When men collude together to circumvent and defraud another, they generally take precaution to conceal or obscure their intentions, frequently by a show of fair dealing and apparent uprightness." We think we are justified in saying that this, and the next two sentences, was the testimony of the judge to the jury, was not even a comment upon any fact proven, nor a statement of the law of the case. And we submit that it was error to say it. If the statement be of a fact, it had not been proved, and as a statement of the law it was unwarranted in the case.

VII. In No. 11, the court tells the jury that, it is for them to say "whether it was *a part of a conspiracy and collusion*, between Charles H. Hall and the defendants, by which Charles H. Hall's property was to be directly or indirectly transferred to the defendants, to defraud the Bank."

And in No. 12, he futher tells the jury, that "if all these circumstances with others which I need not now particularize, when taken together, satisfy you that there was an *intention to defraud the Bank*, and that the drawing of the $5000 draft by Charles H. Hall, and obtaining the $4500 draft, *was part of a scheme for defrauding the Bank*, then you will be authorized to find the issue of fraud for the plaintiff."

1. Again we say, there was no evidence on which the jury could be warranted in finding these facts. It was proved, and not a particle of evidence nor a circumstance to disprove it, that there was no purpose of transferring Charles H. Hall's property to the defendants. If the McAffee sale had been fully consummated, the Bank, and not the defendants, were to have had and would have

had all the benefit of it. It was proved without a word or circumstance to the contrary that, McAffee's notes were to be put up as security to the Bank; and not only that, as the sale resulted Hall and Pope actually advanced $2000, of their own money to McAffee, to make his notes $12,400, when he was only to pay $10,400 for the property; and they went further and guaranteed that the grain, &c., was worth $10,400. In this way they furnished $2000 of collaterals, besides their liability to McAffee. McAffee's notes were good, and by the transaction, the Bank were actually to have had, and would have him as surety of $12,400 besides the acceptance of the defendants.

2. There is not a paritcle of evidence to show that Hall and Pope were to derive a penny's benefit from that sale, but the evidence is uncontradicted that, the whole thing was for the security of the Bank, and not to defraud it, so far, certainly, as the defendants were concerned, knew or had any information. It is perfectly evident that, had the Bank not stopped payment of this $4,500 draft, the defendants would have paid their acceptances $4,500 due same day, would have accepted the drafts of 11th and 12th March when presented, and accepted the $5000 draft of 16th March when it was presented. It was John Weare's folly that produced these results, sacrificed $10,000 worth of property for $4000, and put it out of Charles Hall's power to pay either the Bank or the defendants.

VIII. In No. 15, the "collusion and conspiracy," like Banquo's Ghost, again obtrudes itself upon the scene, but is visible only to the imagination of the judge, sustained by no fact or circumstance, and resting only on the barest suspicion, created solely by the baseless charge of the plaintiff.

IX. In No. 10, after alluding to the relationship of Charles H. Hall to the defendants, the Court tells the jury; "And you have the right to consider, not as conclusive, but as a simple circumstance in the case, from your knowledge of human nature, whether he would not prefer the losses of his business, if any, should fall upon the Bank, rather than upon his brother or his firm."

1. Was this an instruction upon the law of this case, or was it bringing new evidence into it? Is it true, as a rule of natural law, that, one brother is so anxious to protect another that, they collude and conspire together to throw the losses of each onto a third person? Is it true as a matter of law, in view of the evi-

dence in this case, that the jury had the right to consider that, as a circumstance, and find against the evidence, from their knowledge of human nature that, Charles H. Hall did so fraudulently act in a collusive conspiarcy with the defendants that, the losses in his business should fall on the Bank rather than on them? We answer no! emphatically no!! The whole case shows that, Charles H. Hall was importuning the defendants to furnish and put up their own collaterals, to secure their acceptances. That he was constantly drawing on them, for large amounts; keeping the produce in Cedar Rapids, which he was buying with the money obtained on his drafts on them. That he was urging them to accept his drafts, and thus assume for him the losses of his business, if there were any, rather than that the Bank should suffer.

2. We think it was error in law for the court to tell the jury that, they could draw upon their own knowledge, and if they came to the conclusion that, it was human nature for one brother to so manage that, his losses should fall on another rather than on his brother, it was a circumstance tending to prove that, in this case, Charles H. Hall and the defendants had fraudulently and collusively conspired together to defraud the Bank; and the flagrancy of the error was none the less, because they were told that it was not conclusive.

In No. 16, the court said, "You may find one or both these issues for the plaintiff, if you shall consider the proof sufficient; but either will be sufficient to entitle the plaintiff to recover on the drafts declared on."

We have demonstrated that, the court erred in the charge in the particulars pointed out, and they are not in the least cured by any other parts of the charge. But, it we admit that there is evidence tending to show fraud on the part of Charles H, Hall, and that the defendants had notice of it when they received the draft from him; still we say that this No. 16, is an erroneous instruction.

1. We have demonstrated that the consideration for this draft was valid and sufficient to uphold it, even if Charles H Hall had not negotiated it to the defendants, but had brought suit on it in his own name. Neither the Bank nor the plaintiff could have retained his draft on the defendants for $5000, and avoided or rescinded the $4,500. They would have been obliged to surrender Hall's draft to him, before they could insist upon the surrender of the Bank draft.

2. Again, if the Bank had recovered from Charles H. Hall the whole amount of the $5000, even though the defendants neither accepted, secured nor paid it, neither the Bank nor plaintiff could have defended against it on the ground of fraud.

3. Now we have the facts proved by plaintiffs testimony, that he does not own the drafts sued on, but that they belong to the Bank. That the Bank at the time this case was tried had actually received as payment on the $5000 draft over $4000, nearly, if not quite, the amount of the two acceptances sued on, and nearly if not quite the amount of the draft we are attempiing to set-off. It is manifest that the plaintiff in this case is not entitled to defeat this draft entirely, if any part of the money mentioned in the draft of Charles H. Hall, for part of which this draft was given, had been paid or collected. He may be entitled to a rebate from the amount of our draft, to the extent of the damages the Bank had actually sustained by the fraud of Charles H. Hall. The Bank did not pay the whole $5000; nor give credit for it. The interest for the time the draft had to run and the premium for exchange on Chicago were deducted and credit given on the Bank books for the balance. The $4,500 draft is all the Bank ever gave Charles H. Hall for that $5000. If as Weare swears, the Bank has recovered over $4,000 of the $5,000, then all the damages the Bank sustained by the fraud was the difference between $4,500 and the amount actually collected from Charles H. Hall. If that were $500, then we were entitled to set off $4,000 of that draft against our acceptances. And when the court told the jury that if they found that the draft had been procured by fraud, the plaintiff was entitled to recover the amount of the two acceptances sued on, it was error.

4. Of course this argument is based upon the theory that fraud on Charles H. Hall's part, and knowledge of it by the defendants was proved, or that there was evidence tending to prove it.

5. But we say that the transaction was one upon which fraud could not be predicated. The Bank held Charles H. Hall's drafts for $4,500, maturing in Chicago the next day. This $4,500 was to be and was sent to take up or retire those acceptances. It would have been so used, McAffee's notes for $12,4,00 would have been put up as collateral to the $5,000 draft, and Hall and Pope would have accepted if Weare had not himself absolved the defendants from any possible duty to accept it, by stopping payment of the $4,500 as he did.

VI.

The judge has appended to the bill of exceptions, a rebuke to us, for insisting upon incorporating into it so much of the evidence as we have. Entertaining, as we do, the highest respect for the learned judge, personally and officially, we beg leave to say that, we do not think we merited that rebuke. The record shows that, the trial occupied eight days. We state the fact, that, the report of the oral testimony, furnished by the short hand writer, covers 774 closely written pages, besides the charge of the court. The bill of exceptions, without the charge, covers 56 pages of the original written record; while the charge alone, covers almost 15 pages more. We submit that, having boiled down the reporters' notes to about one fourteenth their original volume, to say nothing of the documentary evidence included in the bill, and which was not in the reporters notes, we are not obnoxious to the suggestion, even, that we had unnecessarily incumbered the record. Had we taken the same view of the case that the judge, appears by the charge to have taken, and assumed that want of consideration for our draft, or fraud in procuring it, were the only questions in the case; that, the evidence tended to establish the issue for the plaintiff, on one or both those questions; that the finding of either of those issues for the plaintiff, would be decisive of the whole case; and had utterly overlooked and ignored the evidence tending to establish the settlement and agreement of the parties, made at Cedar Rapids, that the defendants should pay their $9000 of acceptances, and the Bank should pay this $4,500 draft; any statement of facts might have been dispensed with. It was our deliberate opinion then, and it has not changed, that the judge had misconceived the facts and law of the case; that, from the beginning to end, he had been in error; that the facts proved did not justify the charge, nor warrant the verdict of the jury. Hence we did insist that the substance of all the evidence should be incorporated in the bill of exceptions, to the end that, we could present those points to the court, as well as the further point of the settlement and agreement, subsequent to the original transaction. We do not wish to be understood as objecting to the appended statement. We think, however, it justifies us in the effort we have made to show that, the judge took an erronous view of the case from the beginning, and that he never had a real appreciation of the mistakes, into which he fell, both as to the facts of

the case, and the law governing it. We think we have succeeded in pointing out those errors, and in proving that, the verdict was a great wrong to the defendants; that it was produced by the erroneous rulings of the court in the course of the trial, and errors of law contained in the charge, as well in the instructions which were given, as in failing to instruct on matters in the case, which have a controlling influence upon the questions submitted to the jury by the court. We think also that our argument has justified us in persistently insisting that the bill of exception should contain the full statement of the facts that it does, and that there is no fact contained in the record, which is not proper to be there and not necessary to a full comprehension of the errors to be reviewed by the court.

VII.

Finally, we object to the charge of the Court for the following reasons.

1. Because the said Court withdrew by the said charge, from the consideration of the jury, the evidence upon the question of the agreement between the plaintiff, or the First National Bank of Cedar Rapids, and Sherman Hall & Pope, for the payment by Sherman Hall & Pope of the nine thousand dollars of drafts, which they had accepted, and of the payment by the Bank of its draft of forty five hundred dollars to Sherman Hall & Pope.

2. Because it appeared by the evidence that the said The First National Bank of Cedar Rapids had not returned said draft of Charles H. Hall on Sherman Hall & Pope for five thousand dollars, and dated March 16, 1869, to Charles H. Hall, or delivered or offered to deliver it to the defendants, but that it had retained it, and had actually recovered judgment upon it against said Charles H. Hall, and said Court in said written charge, notwithstanding such facts, instructed the jury that if they found from the evidence that the forty-five hundred draft was obtained by C. H. Hall upon the faith and consideration that the defendants should accept the five thousand dollar draft drawn on them by said C. H. Hall on the 16th day of March, 1869, and that they neither accepted it nor secured it by collaterals, nor paid it, then they would find that the consideration for that draft had wholly failed.

3. Because the said Court in said written charge instructed

the jury as to the evidence given in the case in part, and directed them what particular facts they should take into consideration upon the questions at issue, and as to the effect of the evidence upon those questions.

4. Because the said Court in said written charge, in commenting upon the evidence given in the case and in stating parts of it to the jury, made erroneous statements in reference thereto, and gave the jury erroneous impressions of the facts actually proved.

5 Because the said court, in its charge, instructed the jury upon the facts given in evidence and the effect to be given to it, contrary to the rules and practice of the court, and the law of the land in that behalf.

By act of Congress entitled "an act to further the administration of justice," approved June 1, 1872, in the 5th Section, the practice in the United States Courts is required to conform to the practice of the State courts, as regulated by the statute. The statutes in force when this act was passed, are as follows: "The Circuit Courts, in charging the jury, shall only instruct as to the law of the case." Section 28, Chapter 83 R. S.

Section 1, Laws 1847, was as follows; "No Judge of the Circuit Court shall instruct the petit jury in any case, civil or criminal, unless such instructions be reduced to writing."

The same provisions were re-enacted and in force at the time of this trial. Section 139 and 140, Chap. 83, laws of 1872—in force July 1, 1872. We insist that these statutes regulated the practice in the Circuit Court, U. S. Northern Dist. Ill., and that the charge of the court, in so far as it instructed the jury, other than upon the law, was erroneous.

6 Because the said Court, in commenting upon the evidence relative to the sale of the grain to McAffee by C. H. Hall, told the jury that it was also proper for them to consider "that the day before this draft was made by C. H. Hall on the defendants, said C. H. Hall had, in the office of the defendants in Chicago, made a sale of all his grain in store in Cedar Rapids, to one McAffee, and that there would seem to be no resources belonging to the said C. H. Hall with which to indemnify the defendants for this acceptance which he had made on them." Whereas, the only evidence in the case relative to that sale, showed that no sale was actually made in the office of the defendants, and all the evidence, without exception, shows that the negotiations for such sale, and the sale, were made for the express purpose of placing McAffee's notes with

the Third National Bank, as collateral security for the drafts of C. H. Hall on Sherman, Hall and Pope, which they accepted.

7 Because the said Court, in said written charge, notwithstanding that there was evidence given to the jury tending to show that the plaintiff, or The First National Bank of Cedar Rapids, had recovered judgment for the amount of said five thousand dollar draft, drawn by said Charles H. Hall on the defendants, on the 16th day of March, 1869, as well as that the officers of said Bank had collected some part of that judgment, and also that after the said Bank had stopped payment of the said forty-five hundred dollar draft, the officers thereof agreed to pay the same to the defendants, if they would pay the nine thousand of dollars of drafts drawn by C. H. Hall and accepted by them, of which, the acceptances declared on were two, and that the defendants had paid one-half of said nine thousand dollars in money and offered to surrender said forty-five hundred dollar draft in payment of or in exchange for the said two drafts declared on, charged and instructed the jury that, they could find the issue of failure of consideration of said forty-five hundred dollars draft, and if they did so find that the plaintiff would be entitled to a verdict for the amount of the two drafts declared on.

8. Because the said Court in said written charge improperly directed the minds of the jury to facts given in evidence, and to presumptions drawn from such facts, as tending to establish the issues in favor of the plaintiff and against the defendants, and did not direct their minds to the consideration of any facts or presumptions tending to establish the issues in favor of the defendants, and because, by the charge, the Court in effect directed the jury to find a verdict for the plaintiff, for the amount of his two drafts.

9. Because, as a whole, the said written charge of the Court was erroneous in the statement of the evidence, and of the law in the case; in not submitting the whole case to the jury; in directing the minds of the jury to erroneous conclusions; in instructing the jury that they could in any event find a verdict for the plaintiff; and finally, in leaving to the jury for their consideration, questions and matters to be found by them upon which no evidence was given, tending to prove them.

SLEEPER & WHITON,

for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1874.

J. SHERMAN HALL and WILLIAM J. POPE, PLAINTIFFS IN ERROR,
vs.
JOHN WEARE, DEFENDANT IN ERROR.

No. 302.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT OF W. PENN. CLARKE,

OF COUNSEL FOR DEFENDANT IN ERROR.

WASHINGTON, D. C.:
CHRONICLE PUBLISHING COMPANY PRINT.
1875.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1874.

J. SHERMAN HALL and WILLIAM J. POPE, Plaintiffs in Error, *vs.* JOHN WEARE, Defendant in Error. } No. 302.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

This action was commenced in the Circuit Court of the United States for the Northern District of Illinois, by the defendant in error against the plaintiffs in error, as acceptors of two bills of exchange, which read as follows:

[Stamp, $1.25.]

$2,500. CEDAR RAPIDS, IOWA, *March* 1, 1869.

Fifteen days after date pay to the order of John Weare, cashier, twenty-five hundred dollars. C. H. HALL.

To SHERMAN HALL & POPE, Chicago.

[Stamp, $1.00.]

$2,000. CEDAR RAPIDS, IOWA, *March* 5, 1869.

Ten days after date pay to the order of John Weare, cashier, two thousand dollars. C. H. HALL.

To SHERMAN HALL & POPE, Chicago.

Each of which was indorsed as follows:

"Accepted, SHERMAN HALL & POPE, GOOCH."

The declaration is in the usual form, and includes the common money counts, to which was attached an account for money lent, &c.

To this declaration, the plaintiffs in error, defendants below, pleaded:

I. The General Issue.

1 And the said defendants, by E. A. Storrs and Sleeper & Whilton, their attorneys, come and defend the wrong and injury when, &c., and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof in complaining declared against them, and the said plaintiff doth the like, &c.

II. Pleas of Set-off.

2. And for a further plea in this behalf, by leave of the court here first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said plaintiff heretofore, to wit: on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, at Cedar Rapids, in the State of Iowa, to wit: at Chicago, in the said northern district of Illinois, made his certain draft or bill of exchange, in writing, bearing date on a day certain therein mentioned, to wit: on the day and year last aforesaid, and signed the same with his own proper hand, and with the addition thereto of the word "cashier," and directed the same to the Third National Bank of Chicago, in the State of Illinois, and therein and thereby, for value received, directed the said, The Third National Bank of Chicago, upon sight of the said bill of exchange, to pay to the order of C. H. Hall the sum of four thousand and five hundred dollars, and then and there delivered the same to the said C. H. Hall; and thereupon the said C. H. Hall, afterwards, to wit: on the same day and year aforesaid, at Cedar Rapids, aforesaid, to wit: at Chicago aforesaid, endorsed the said bill of exchange to the said defendants, and then and there

delivered the same to them, and did thereby then and there order and direct the said sum of money in the said bill of exchange mentioned to be paid to the said defendants, and which said bill of exchange was afterwards, to wit: on the same day and year last aforesaid, to wit: at the city of Chicago aforesaid, presented and shown to the said The Third National Bank of Chicago for payment, and payment thereof demanded; but the said The Third National Bank of Chicago then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said plaintiff afterwards, to wit: on the day and year last aforesaid, to wit: at Chicago, to wit: at Cedar Rapids aforesaid, had due notice; and the said defendants aver that the said bill of exchange was afterwards, to wit: on the day and year last aforesaid, to wit: at Chicago aforesaid, duly protested for non-payment thereof, of which the said plaintiff also had due notice, to wit: on the day and at the place aforesaid; and the said defendants further aver that the costs and charges of said protest amounted to a large sum of money, to wit: to the sum of five dollars, which sum was paid out and expended therefor by these defendants, whereby and by means whereof, and by force of the statute in such case made and provided, the said plaintiff became and was liable to pay to the said defendants the said sum of money in the said bill of exchange mentioned, and the said costs of protest, and the interest on the said sum of money in the said bill of exchange specified until the same was paid, and five per cent. damages on the said sum of money; and being so liable, and in consideration thereof, he, the said plaintiff, afterwards, to wit: on the day and year aforesaid, and at the place aforesaid, undertook and promised the said defendants to pay to them said sum of money and the interest thereon and the said five per cent. damages and the said costs and charges of protest, but has hitherto neglected and refused so to do, and still refuses so to do; wherefore the said several sums of money now remain due and owing from the said plaintiff to the said defendants; and the said defendants will set off and allow to the said plaintiff on the trial of this cause so much of the said several sums of money so due

and owing from the said plaintiff to the said defendants against any demand of the said plaintiff to be proved on the said trial as will be sufficient to satisfy and discharge such demand according to the statute in such case made and provided, and have the balance certified in their favor; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof, against them, &c.

3. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said plaintiff on the said first day of March and the said fifth day of March, one thousand eight hundred and sixty-nine, was the cashier of the First National Bank of Cedar Rapids, in the State of Iowa, and continued to be such cashier from thence to the time of the commencement of this suit; that the said bills of exchange in the said declaration mentioned were delivered by the said Charles H. Hall to the said plaintiff, as such cashier, for the said The First National Bank of Cedar Rapids, and the said bank then and there became and was the legal owner and holder thereof, and of each of the said bills of exchange, and so continued to be such legal owner and holder of said bills of exchange, and of each of them, from the date of each until the commencement of this suit.

And the said defendants further say that the said The First National Bank of Cedar Rapids afterwards, to wit: on the sixteenth day of March, one thousand eight hundred and sixty-nine, at Cedar Rapids aforesaid, to wit: at Chicago aforesaid, made its certain bill of exchange in writing, bearing date on a day certain therein mentioned, to wit: the day and year last aforesaid, and directed the same to the Third National Bank of Chicago, in the State of Illinois, and then and there delivered the same to the said Charles H. Hall, wherein and whereby the said The First National Bank of Cedar Rapids directed the said The Third National Bank of Chicago to pay to the order of said Charles H. Hall, by the name and description of C. H. Hall, the sum of four thousand dollars upon sight

of said bill of exchange, which said bill of exchange the said Charles H. Hall afterwards, to wit: on the day and year, and at the place last aforesaid, indorsed, and then and there delivered the same to the said plaintiff, and then and there thereby appointed and directed the said sum of money in the said bill of exchange specified to be paid to the said defendants, and which said bill of exchange afterwards, to wit: on the same day and year, to wit: at the said city of Chicago, was presented to the said The Third National Bank of Chicago for payment, and payment thereof demanded; but the said The Third National Bank of Chicago then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, and the said bill of exchange was then and there, to wit: on the day and year last aforesaid, duly protested for non-payment thereof, of which non-payment and protest the said The First National Bank of Cedar Rapids afterwards, to wit: on the day and year last aforesaid, at Cedar Rapids aforesaid, had due notice.

And the said defendants aver that the costs and charges of said protest were paid by them, and amounted to a large sum of money, to wit: the sum of five dollars, and that by means of the premises, and by force of the statute in such case made and provided, the said The First National Bank of Cedar Rapids became and were liable to pay to the said defendants the said sum of four thousand and five hundred dollars in the said bill of exchange specified, and damages thereon at the rate of five per cent. upon said sum of money, and said costs and charges of said protest, and interest on said sum of forty-five hundred dollars until the same was paid, which said several sums of money amount in the whole to a large sum of money, to wit: to the sum of five thousand dollars; and that the said The First National Bank of Cedar Rapids, while it was so the legal holder and owner of the said two bills of exchange, in the said declaration mentioned, became and was indebted to the said defendants in the said several sums of money, and at the commencement of this suit was, and still is, indebted to the said defendants by reason of the premises in a large sum of money, to wit: the said sum of five thousand dollars, of all which the

said plaintiff had due notice; and the said defendants will set off and allow to the said plaintiff, on the trial of this action, so much of the said sum of money so due and owing to them from the said bank against the said sums of money specified in the said two bills of exchange in the said declaration mentioned as will be sufficient to satisfy and discharge the same in full, and have the balance certified in their favor, according to the statute in such case made and provided; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

To these pleas the plaintiff replied as follows:

I. Replication of Fraud and Misrepresentation to Defendants' Second Plea.

2. And the said plaintiff, for replication to the second plea by the said defendants pleaded, says that he, the plaintiff, ought not, by anything in said plea contained, to be barred from having or maintaining his action aforesaid, because, he says, that the bill of exchange in the said plea specified and proposed to be set off, was obtained by fraud, covin, and misrepresentation, in this, to wit, that at the time and place in said plea mentioned Charles H. Hall, in order to induce the plaintiff to issue to said C. H. Hall said bill of exchange, falsely and fraudulently represented and stated to the plaintiff that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff on said defendants, and which the said C. H. Hall had before then procured to be discounted by the plaintiff upon the faith on the part of the plaintiff that the same would be accepted by said defendants, and which said bills amounted to a large sum, to wit, $11,000, and which bills of exchange said plaintiff had before then forwarded to Chicago for presentation to and acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as the plaintiff had required as a condition of any further discount by the plaintiff of any draft of said C. H. Hall on said defendants, had been by said defendants

deposited with L. V. Parsons, cashier of the Third National Bank of Chicago, at Chicago, to his (said Parsons') satisfaction, and the said C. H. Hall then and there, well knowing that the said bills of exchange had not been accepted, nor said securities deposited by said defendants, but contriving and intending to wrong, deceive, and defraud said plaintiff; and plaintiff avers that, relying upon said representations of said C. H. Hall, and upon the good faith and truth of said representations that said defendants had accepted said bills of exchange as before then drawn on them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons aforesaid, and upon no other consideration whatever, said plaintiff executed and delivered to said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences and representations of said C. H. Hall were, each and every thereof, false and fraudulent, and made with intent to deceive and mislead and defraud said plaintiff; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not, nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not, nor would, deposit with said L. V. Parsons or any other person any collateral security for said bills so before then drawn on them.

And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, remain and still are wholly due and payable to the plaintiff, and the said C. H. Hall, though often requested, has not paid said several bills, nor any of them, nor any part thereof; and the said defendants have hitherto wholly neglected and refused, and still do refuse, to accept or pay said several bills of exchange so drawn on them as aforesaid, or any of them, or any part thereof, or to deposit any securities therefor as aforesaid; by reason whereof the plaintiff hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000 00.

And the plaintiff further avers that at the time the said defendants received the supposed bill of exchange in said

plea mentioned they had notice and knowledge of the frauds, misrepresentation, and covin of said C. H. Hall in the premises, and plaintiff avers that the said defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said bill of exchange in bad faith as against the plaintiff, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor, and that, in further pursuance of the said conspiracy and combination between said defendants and said C. H. Hall to cheat, wrong, and defraud the plaintiff, the defendants then and there confederated with said C. H. Hall to cause the property of said C. H. Hall to be disposed of by him to a large amount, to wit, $10,000 00, in the interest of said defendants and in fraud of the rights of the plaintiff; and this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

II. Replication of Failure of Consideration to Defendants' Second Plea.

2. And the said plaintiff, for further replication to the second plea by the said defendants pleaded, by leave of the court first had and obtained, says that he, the plaintiff, ought not by anything in said plea contained to be barred from having or maintaining his action aforesaid, because, he says, the consideration upon which the bill of exchange in the said plea specified and proposed to be set off was obtained has failed in this, to wit, that the sole and only consideration of the issuing of said bill of exchange in said plea mentioned was as follows, to wit, that at the time and place of drawing of said supposed bill of exchange Charles H. Hall, by the name and style of C. H. Hall, drew upon said defendants his certain bill of exchange in substance as follows, to wit:

$5,000 00.] Cedar Rapids, Iowa, *March* 16, 1869.

Fifteen days after date, pay to the order of John Weare, cashier, five thousand dollars. C. H. HALL.

To Sherman Hall & Pope,
Chicago.

And then and there presented said bill of exchange to the plaintiff for discount; and then and there, in order to induce the plaintiff to discount said bill of exchange above set forth, and to issue to said C. H. Hall the bill of exchange in said plea mentioned, falsely and fraudulently represented and stated to the plaintiff that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff on said defendants, and which the said C. H. Hall had before then procured to be discounted by said plaintiff upon the faith on the part of the plaintiff that the same would be accepted by said defendants, which said bills amounted to a large sum, to wit, $11,000 00, and which bills of exchange said plaintiff had before then forwarded to Chicago, for presentation to and acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, which the plaintiff had required as a condition of any further discount by the plaintiff of any drafts of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons, to his (said Parsons') satisfaction, he, the said C. H. Hall, then and there well knowing that said bills of exchange had not been accepted, nor said securities deposited by defendants, but contriving and intending to wrong and defraud said plaintiff; and further to deceive and mislead the plaintiff, said C. H. Hall then and there represented to the plaintiff that said defendants would accept and pay said bill of exchange then and there so drawn as aforesaid on said defendants by said C. H. Hall, and would deposit collateral securities to such acceptance with said L. V. Parsons, to his (said Parsons') satisfaction, above set forth, the said C. H. Hall then and there well knowing that said defendants did not intend to, and would not accept, secure, or pay said bill of exchange so then and there drawn as aforesaid.

And plaintiff avers that, relying on said promises, representations, and undertakings of said C. H. Hall, and upon the good faith of said representations that said defendants had accepted said bills of exchange so before then drawn on them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons aforesaid, and that the said defendants would accept and

pay said bill of exchange then and there drawn on them by said C. H Hall as aforesaid, and upon no other consideration whatever, said plaintiff received and discounted said bill of exchange in this replication first mentioned, so then and there drawn by said C. H. Hall on said defendants, and as a part of the proceeds thereof executed and delivered to the said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences, representations, and promises of said C. H. Hall were each and every thereof false and fraudulent, and made with intent to deceive, mislead, and defraud said plaintiff; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not nor would deposit with said L. V. Parsons, or any other person, any collateral security for the bills before them so drawn on them, and did not nor would, on presentation thereof, accept, secure, or pay said bill of exchange so then and there drawn on them by said C. H. Hall, and first in this replication mentioned, although the same was, after the drawing thereof, to wit, on the 17th day of March, 1869, duly presented and shown to said defendants for acceptance, which was then and there refused, and said bill was then and there duly protested, whereof the said C. H. Hall was then and there duly notified.

And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, and said bill of exchange, first in this replication mentioned, so then and there drawn by said C. H. Hall on said defendants, remain and still are wholly due and payable to the plaintiff; and the said C. H. Hall, though often requested, has not paid said several bills, nor any part thereof, but so to do has hitherto wholly neglected and refused, and still does refuse; and the said defendants have hitherto wholly neglected and refused, and still do refuse to accept or pay said several bills of exchange so drawn upon them by said C. H. Hall or any thereof, or to deposit any securities therefor as aforesaid, by reason whereof the plaintiff hath lost large

sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000 00.

And plaintiff further aver' that, at the time the said defendants received the supposed bill of exchange in said plea mentioned, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said bill of exchange, in said plea mentioned and proposed to be set off, was drawn and executed by the plaintiff; and that the said defendants combined and confederated with the said C. H. Hall in the premises, and received from C. H. Hall the said bill of exchange in said plea mentioned, in bad faith as against the plaintiff, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor.

And the plaintiff further avers that said bill of exchange, in this replication first mentioned, was heretofore, to wit, on the 9th day of October, 1871, at Chicago aforesaid, by casualty and without the fault of the plaintiff, lost and destroyed by fire.

And this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

III. Replication of Fraud and Misrepresentation to Defendants' Third Plea.

3. And the plaintiff, for replication to the third plea of the defendants, says precludi non, &c., because he says that the bills of exchange in the declaration mentioned are held by him, and this suit is prosecuted by him in behalf of the First National Bank of Cedar Rapids, Iowa; and that the supposed bill of exchange in said plea mentioned was drawn by said plaintiff for and in behalf of said bank, and was obtained by fraud, covin, and misrepresentation in this, to wit, that, at the time and place in said plea mentioned, Charles H. Hall, in order to induce the said bank to issue to said C. H. Hall said bill of exchange, falsely and fraudulently represented and stated to the plaintiff, acting for and on behalf of said bank, that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff, as cashier of said bank, on

said defendants, and which bills of exchange were then and there the property of said bank, and which the said C. H. Hall had before then procured to be discounted by said bank upon the faith, on the part of said bank, that the same would be accepted by said defendants, and which bills amounted to a large sum, to wit, $11,000 00, and which bills of exchange said bank had before then forwarded to Chicago for presentation to, and acceptance by, said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as said bank had required as a condition of any further discount of any draft of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons, cashier of the Third National Bank of Chicago, at Chicago, to his, said Parsons', satisfaction, he, the said C. H. Hall, then and there well knowing that the said bill of exchange had not been accepted, nor said securities deposited by said defendants, but contriving and intending to wrong, deceive, and defraud said bank. And plaintiff avers that, relying upon said representations of said C. H. Hall and upon the good faith and truth of said representations that said defendants had accepted said bills of exchange so before then drawn upon them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons as aforesaid, said bank executed and delivered to said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences and representations of said C. H. Hall were, each and every thereof, false and fraudulent, and made with intent to deceive, mislead, and defraud said bank; that said defendants, as said C. H. Hall then and there well knew, had not accepted, nor did not, nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not, nor would deposit with said L. V. Parsons, or any other person, any collateral security for said bills so before then drawn on them. And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, remain and still are wholly due and

payable to said bank; and the said C. H. Hall, though often requested, has not paid said several bills, or any of them, or any part thereof, and the said defendants have hitherto wholly neglected and refused, and still do refuse to accept or pay said several bills of exchange so drawn upon them by said C. H Hall, or any thereof, or to deposit any securities therefor as aforesaid; by reason whereof the said bank hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000.00. And plaintiff further avers that, at the time the said defendants received the supposed bill of exchange in said plea mentioned, and proposed to be set off, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said supposed bill of exchange in said plea mentioned and proposed to be set off was drawn and executed by said bank. And plaintiff avers that the defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said supposed bill of exchange in said plea mentioned in bad faith as against the said bank, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor; and that, in further pursuance of the said conspiracy and combination of said defendants and said C. H. Hall to cheat, wrong, and defraud the plaintiff, the defendants then and there confederated with said C. H. Hall to cause the property of said C. H. Hall to be disposed of by him to a large amount, to wit, $10,000.00, in the interest of said defendants and in fraud of the rights of said bank in the premises.

And this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

IV. Replication of Failure of Consideration to Defendants' Third Plea.

3. And the said plaintiff, for further replication to the third plea by the said defendants, pleaded by leave of the court first had and obtained, says, precludi non, &c., because he says that the bills of exchange in the declaration

mentioned are held by him, and this suit is prosecuted by him for and in behalf of the First National Bank of Cedar Rapids, Iowa, and that the consideration upon which the supposed bill of exchange, in said plea specified and proposed to be set off was obtained has failed in this, to wit, that the sole and only consideration of the issuing of said supposed bill of exchange in said plea specified was as follows, to wit, that at the time and place of the drawing of said supposed bill of exchange, Charles H. Hall, by the name and style of C. H. Hall, drew upon the defendants his certain bill of exchange in substance as follows, to wit:

$5,000.00.] CEDAR RAPIDS, IOWA, *March* 16, 1869.

Fifteen days after date pay to the order of John Weare, cashier, five thousand dollars.

C. H. HALL.

To SHERMAN HALL & POPE, *Chicago.*

And then and there presented said bill of exchange to said bank for discount, and then and there, in order to induce the said bank to discount said bills of exchange above set forth, and to issue to said C. H. Hall the supposed bill of exchange in said plea mentioned, falsely and fraudulently represented and stated to the plaintiff, acting for and on behalf of said bank, that certain bills of exchange before then drawn by said C. H. Hall in favor of said bank on said defendants, and which the said C. H. Hall had before then procured to be discounted by said bank upon the faith on the part of said bank that the same would be accepted by said defendants, which said bills amounted to a large sum, to wit, $11,000.00, and which bills of exchange said bank had before then forwarded to Chicago for presentation to and acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as said bank had required as a condition of any further discount by said bank of any further draft of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons to his, said Parsons', satisfaction, he the said C. H. Hall then and there well knowing that said bills of exchange had not been accepted, nor

said securities deposited by said defendants, but contriving and intending to wrong and defraud said bank and further to deceive and mislead said bank, said C. H. Hall then and there represented to the plaintiff that said defendants would accept and pay said bill of exchange then and there so drawn as aforesaid on said defendants by said C. H. Hall, in this replication first mentioned, and would deposit collateral securities to such acceptance with said L. V. Parsons, to his, said Parsons', satisfaction, the said C. H. Hall then and there well knowing that said defendants did not intend to and would not accept, secure, or pay said bill of exchange so then and there drawn on them as aforesaid, and plaintiff avers that, relying upon said promises, representations, and undertakings of said C. H. Hall, and upon the good faith of said representations that said defendants had accepted said bills of exchange so before then drawn on them by said C. H. Hall, and had deposited securities there for the satisfaction of said L. V. Parsons as aforesaid, and that the said defendants would accept and pay said bill of exchange then and there drawn on them by said C. H. Hall, as aforesaid, and upon no other consideration whatever, said bank received and discounted said bill of exchange in this replication first mentioned, so then and there drawn by said C. H. Hall on said defendants, and, as a part of the proceeds thereof, executed and delivered to the said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences, representations, and promises of said C. H. Hall were each and every thereof false and fraudulent, and made with intent to deceive, mislead, and defraud said bank; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not nor would deposit with said L. V. Parsons, or any other person, any collateral security for the bills before then so drawn on them, and did not nor would, on presentation thereof, accept, secure, or pay said bill of exchange so then and there drawn on them by said C. H. Hall, and first in this replication mentioned, although the same was after the drawing thereof, to wit,

on the 17th day of March, 1869, duly presented and shown to said defendants for acceptance, which was then and there refused, and said bill was then and there duly protested, whereof the said C. H. Hall was then and there duly notified.

And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, and said bill of exchange first in this replication mentioned so then and there drawn by said C. H. Hall on said defendants, remain and still are wholly due and payable to the plaintiff, and the said C. H. Hall, though often requested, has not paid said several bills, or any of them or any part thereof, but so to do has hitherto wholly neglected and refused and still does refuse, and the said defendants have hitherto wholly neglected and refused, and still do refuse, to accept or pay said several bills of exchange so drawn upon them by said C. H. Hall, or any thereof, or to deposit any securities therefor as aforesaid by reason whereof the said bank hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $10,000 00.

And plaintiff further avers that, at the time said defendants received the supposed bill of exchange in said plea mentioned, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said bill of exchange in said plea mentioned and proposed to be set off was drawn and executed by the said bank, and that the said defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said bill of exchange in said plea mentioned, in bad faith as against the said bank, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor.

And the plaintiff further avers that said bill of exchange in this replication first mentioned was heretofore, to wit, on the 9th day of October, 1871, at Chicago aforesaid, by casualty and without the fault of said bank or of the plaintiff, lost and destroyed by fire.

And this the plaintiff is ready to verify; wherefore he prays judgment, &c.

To these replications the defendants filed rejoinders, as follows:

I. First Rejoinder to First Replication to Second Plea.

And afterwards, to wit, on the fifth day of February, A. D. 1873, the said defendants by their attorneys come and file their rejoinder to said pleas, which reads in the words and figures following, to wit:

And the said defendants as to the said replication of the said plaintiff by him firstly above replied to the said second plea of the said defendants, say that, by reason of anything in that replication alleged, the said plaintiff ought not to have or maintain his aforesaid action thereof against him, nor ought they to be barred or precluded from having and maintaining their set-off in the said second plea mentioned, because they say that before the making and delivery of the said bill of exchange by the said plaintiff in that plea described, the said Charles H. Hall had drawn upon the said defendants divers and sundry bills of exchange payable at a day certain after the dates thereof respectively, and delivered the same to the said plaintiff, in and by which the said Charles H. Hall had ordered and directed the said defendants to pay to the said plaintiff the sums of money in said bills of exchange respectively mentioned, according to the tenor and effect of the said bills of exchange respectively, which said bills of exchange the said defendants, upon presentation thereof to them, accepted, to wit, at Chicago aforesaid, of which the said plaintiff had due notice.

And the said defendants aver that they, the said defendants, so accepted the said bills of exchange for the mere accommodation of the said Charles H. Hall and without any benefit or advantage or consideration whatever.

And before and at the said several times when the said defendants so accepted said several bills of exchange, he, the said Charles H. Hall, undertook and then and there promised the said defendants, in consideration that they would and did so accept the said bills of exchange for his accommodation as aforesaid, that he, the said

Charles H. Hall, would pay said several bills of exchange when they by their terms respectively became due and payable; and that on the said sixteenth day of March, A. D. 1869, the day of the date of said bill of exchange in the said second plea mentioned, there were outstanding and unpaid a large number of said bills of exchange, to wit, ten of such bills of exchange, and in the whole they amounted to a large sum of money, to wit, the sum of fifteen thousand dollars, of which said several bills of exchange, the said bills of exchange in the said declaration mentioned are a part. Of all which last-mentioned matters the said plaintiff had due notice, and well knew.

And the said defendants further aver that of the said several bills of exchange so as aforesaid accepted by the defendants as and for the mere accommodation of the said Charles H. Hall, there was one which, by the terms thereof, became due and payable at the City of Chicago on, to wit, the seventeenth day of March aforesaid, which the said plaintiff then and there, to wit, on the said sixteenth day of said March, had due notice and well knew, which said last-mentioned bill of exchange was for a certain sum of money therein named, to wit, the sum of four thousand and five hundred dollars.

And the said defendants further aver that the said Charles H. Hall, in pursuance of his said promise and undertaking aforesaid with the said defendants to pay said bills of exchange so accepted by the said defendants for his accommodation, and in consideration of the liability of the said defendants aforesaid, and for the purpose of furnishing to the said defendants the means, and putting them in funds with which to meet and pay said bill of exchange so to become due and payable as aforesaid, to wit, on the said seventeenth day of March, of which the said plaintiff had due notice, and for a good and valuable consideration by him then and there given to the said plaintiff, and not for the cause or consideration, nor by the means in the said replication mentioned, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned. And afterwards, to wit, on the day and year, and at the place in the said second plea mentioned, and for the consideration afore-

said, endorsed and delivered the said bill of exchange to the said defendants, and the said defendants then and there received the said bill of exchange from the said Charles H. Hall, for a good and valuable consideration, and in due and regular course of business, in the utmost good faith, and without any notice or knowledge of the said several matters in the said replication alleged, of all which the said plaintiff had due notice.

And the said defendants further aver that they did afterwards, to wit, on the said seventeenth day of March, aforesaid, pay to the said plaintiff and discharge in full the said bill of exchange so by them accepted for the accommodation of the said Charles H. Hall, and which became due on the day last aforesaid, which the said plaintiff well knew.

And the said defendants further aver that the said plaintiff, well knowing the premises, but fraudulently intending and craftily and subtly contriving to injure and defraud the said defendants in that behalf, directed the said The Third National Bank of Chicago not to pay the said bill of exchange in the said plea mentioned to the said defendants, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, and then and there fraudulently stopped payment thereof, to wit, at Chicago aforesaid, without that that the said bill of exchange in the said second plea mentioned was obtained by the said Charles H. Hall by the said fraud, covin, or deceit, in the said first replication alleged. And this the said defendants are ready to verify. Wherefore they pray judgment that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, and that they may have and be allowed their set-off in the said plea mentioned, &c.

II. Second Rejoinder to First Replication to Second Plea.

And, for a further and second rejoinder to the said first replication to the said second plea, the said defendants, by leave of the court here first had and obtained, say that, by reason of anything in that replication alleged, the said

plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred or precluded from having or maintaining their set-off in the said second plea mentioned, because they say that before the making and delivery of the said bill of exchange by the said plaintiff in that plea described, the said Charles H. Hall had drawn upon the said defendants divers and sundry bills of exchange payable at a day certain after the dates thereof, respectively, and delivered the same to the said plaintiff, in and by which the said Charles H. Hall had ordered and directed the said defendants to pay to the said plaintiff the sums of money in said bills of exchange respectively mentioned, according to the tenor and effect of the said bills of exchange, respectively, which said bills of exchange the said defendants, upon presentation thereof to them, accepted, to wit, at Chicago aforesaid, of which the said plaintiff had due notice.

And the said defendants aver that they, the said defendants, so accepted the said bills of exchange for the mere accommodation of the said Charles H. Hall, and without any benefit or advantage or consideration whatever. And before, and at the said several times when the said defendants so accepted said several bills of exchange, he, the said Charles H. Hall, undertook, and then and there promised the said defendants, in consideration that they would and did so accept the said bills of exchange for his accommodation, as aforesaid, that he, the said Charles H. Hall, would pay said several bills of exchange when they, by their terms, respectively, became due and payable.

And that on the said sixteenth day of March, A. D. 1869, the day of the date of said bill of exchange in the said second plea mentioned, there were outstanding and unpaid a large number of said bills of exchange, to wit, ten of such bills of exchange; and in the whole they amounted to a large sum of money, to wit, the sum of fifteen thousand dollars, of which said several bills of exchange the said bills of exchange in the said declaration mentioned are a part; of all of which last-mentioned matters the said plaintiff had due notice and well knew.

And the said defendants further aver that of the said

several bills of exchange, so as aforesaid accepted by the said defendants as and for the mere accommodation of the said Charles H. Hall, there was one which by the terms thereof came due and payable at the city of Chicago on, to wit, the seventeenth day of March aforesaid, which the said plaintiff then and there, to wit, on the said sixteenth day of said March, had due notice and well knew, which said last-mentioned bill of exchange was for a certain sum of money therein named, to wit, the sum of four thousand and five hundred dollars.

And the said defendants further aver that the said Charles H. Hall, in pursuance of his said promise and undertaking aforesaid with the said defendants, to pay said bills of exchange, so accepted by the said defendants for his accommodation, and in consideration of the liability of the said defendants aforesaid, and for the purpose of furnishing to the said defendants the means and putting them in funds with which to meet and pay said bill of exchange, so to become due and payable as aforesaid, to wit, on the said seventeenth day of March, of which the said plaintiff had due notice, and for a good and valuable consideration by him then and there given to the said plaintiff, and not for the cause or consideration nor by the means in the said replication mentioned, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned. And afterwards, to wit, on the day and year and at the place in the said second plea mentioned, and for the consideration aforesaid, indorsed and delivered the said bill of exchange to the said defendants, and the said defendants then and there received the said bill of exchange from the said Charles H. Hall for a good and valuable consideration, and in the due and regular course of business, and in the utmost good faith, and without any notice or knowledge of the said several matters in the said replication alleged. Of all which the said plaintiff had due notice.

And the said defendants further aver that they did afterwards, to wit, on the said seventeenth day of March aforesaid, pay to the said plaintiff and discharge in full the said bill of exchange, so by them accepted for the accommodation of the said Charles H. Hall, and which be-

came due on the day last aforesaid, which the said plaintiff well knew.

And the said defendants further aver that the said plaintiff, well knowing the premises, but fraudulently intending and craftily and subtly contriving to injure and defraud the said defendants in that behalf, directed the said The Third National Bank of Chicago not to pay the said bill of exchange in the said plea mentioned to the said defendants, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, and then and there fraudulently stopped payment thereof, to wit, at Chicago aforesaid.

Without that, that the said defendants combined and confederated with the said Charles H. Hall, in the premises in the said replication, or to cause the property of the said Charles H. Hall, or any of it, to be disposed of as in that replication alleged, and this the said defendants are ready to verify.

Wherefore they pray judgment, as in and by their said plea they have already prayed, &c.

III. First Rejoinder to Second Replication to Second Plea.

3. And the said defendants, as to the said replication of the said plaintiff, by him secondly replied to the said second plea, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, nor ought they, the said defendants, to be barred or precluded from having and maintaining their set-off aforesaid, because they say that they, the said defendants, had before the sixteenth day of March, 1869, at the request of the said Charles H. Hall, and for his mere accommodation, accepted divers, to wit, ten bills of exchange drawn by the said Charles H. Hall on the said defendants for divers large sums of money, amounting in all, to wit, to the sum of fifteen thousand dollars, all drawn in favor of the said plaintiff, and all due at a certain day after the date thereof, and all owned by the said plaintiff, of which the said bills of exchange in the said declaration mentioned are a part, and which said bills the said defendants

had so accepted upon the promise and undertaking of the said Charles H. Hall, made to them and before the said times, respectively, when they so accepted the same, that he, the said Charles H. Hall, would, whenever any of the said bills became due and payable, pay the same, and keep and indemnify the said defendants from all liability thereon. All which was well known to the said plaintiff.

And the said defendants further aver that one of said bills of exchange for a large sum of money, to wit, the sum of forty-five hundred dollars, became and was due and payable on a day certain therein mentioned, to wit, the seventeenth day of March, A. D. 1869, at the city of Chicago aforesaid, and the said Charles H. Hall, on the said sixteenth day of March, A. D. 1869, at Cedar Rapids, Iowa, in pursuance of his said promise and undertaking to pay said bills of exchange when they became due, and for the purpose of providing the said defendants with the means, money, or funds with which to pay said last-mentioned bill of exchange on the day when by its terms it became and was due and payable, of which the said defendants then and there had due notice, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned, in good faith and for a good and valuable consideration, and without any fraud, covin, deceit, misrepresentation, or false statement, and afterwards, to wit, on the said sixteenth day of March, for a good and valuable consideration, endorsed and delivered the said bill of exchange to the said defendants, as in the said second plea alleged, of which the said plaintiff had due notice. And the said defendants then and there received the said bill of exchange from the said Charles H. Hall in good faith for a valuable consideration and in the due course of business, without any notice or knowledge of any of the said matters in the said replication alleged.

And the said defendants aver that they, the said defendants, afterwards, to wit, on the said seventeenth day of March, 1869, to wit, at Chicago, paid the said bill of exchange so accepted by them for the accommodation of said Charles H. Hall, and which became due on that day to the plaintiff. But the said plaintiff, well knowing the premises, but craftily and subtly contriving and fraudu-

lently intending to injure and deceive the said defendants in that behalf, directed the said The Third National Bank of Chicago not to accept or pay the said bill of exchange in the said second plea described to the said defendants, and then and there fraudulently stopped the payment of said bill of exchange without that that the said defendants combined or confederated with the said Charles H. Hall in the premises in the said second replication mentioned in manner and form as therein alleged, and this the said defendants are ready to verify; wherefore they pray judgment as in and by their said second plea they have already prayed, &c.

IV. Second Rejoinder to Second Replication to Second Plea.

2. And for a further rejoinder to the said second replication of the said plaintiff to the said second plea, by leave of the court here first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having or maintaining their said set-off in the said plea mentioned, by reason of anything in that replication contained, because they say that they, the said defendants, before the said sixteenth day of March, 1869, had accepted drafts or bills of exchange drawn on them by the said Charles H. Hall in favor of the said plaintiff, which by their terms did not become due or payable until after the said sixteenth day of March, 1869, and which were then held and owned by the said plaintiff, and in the whole amounted to a large sum of money, to wit, the sum of twelve thousand dollars, and which said bills of exchange the said defendants had so accepted for the mere accommodation of the said Charles H. Hall, and the said Charles H. Hall had at and before the acceptance thereof undertaken and promised the said defendants to pay the same when by their terms they became due; of all which the said plaintiff had due notice and well knew.

And the said defendants in fact say that one of the said drafts or bills of exchange so accepted by them as afore-

said by its terms, afterwards, to wit, on the seventeenth day of March, 1869, became due and payable, and *and* the said defendants afterwards, to wit, on that day, paid the same to the said plaintiff; that on the said sixteenth day of March, 1869, at Cedar Rapids, in the State of Iowa, the said Charles H. Hall, in pursuance of his promise and undertaking to pay said draft or bill of exchange at maturity, and for the purpose of giving to the said defendants the money and means with which to pay the same, without any knowledge, confederation, or combination with him by the said defendants as in said replication alleged, and for a good and valuable consideration, and in good faith, obtained the said bill of exchange from the said plaintiff, and then and there indorsed and delivered the same to the said defendants as in the said second plea alleged, of all which the said plaintiff then and there had due notice.

And the said defendants aver that they received the said bill of exchange in the said second plea mentioned in good faith, in the due and regular course of business, and upon a good and valuable consideration, without any notice or knowledge of any of the matters alleged in the said second replication, without that, that the said bill of exchange was obtained by the said Charles H. Hall, by means of covin, fraud, deceit, and misrepresentation in the said replication alleged, in manner and form as the said plaintiff hath therein stated and alleged. And this the said defendants are ready to verify; wherefore they pray judgment as in and by their second plea they have already prayed, &c.

V. First Rejoinder to First Replication to Third Plea.

And as to the said replication of the said plaintiff by him firstly above replied to the said third plea of the said defendants, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having and maintaining their said set-off in that plea mentioned by reason of anything in that replication contained, because they say that before the said sixteenth day of March, 1869,

they, the said defendants, had accepted divers bills of exchange drawn on them by the said Charles H. Hall, in favor of the said The First National Bank of Cedar Rapids, to a large amount, to wit, to the amount of twelve thousand dollars, for the mere accommodation of the said Charles H. Hall, and without any consideration, benefit, or advantage to them, which bills of exchange had not then by the terms thereof, nor had any of them, matured; all which matters and things were well known to the said bank, and to the said plaintiff then and there.

And the said defendants aver that the said Charles H. Hall, at and before the acceptance of the said bills of exchange, had undertaken and promised the said defendants that he would pay and discharge all of said bills of exchange as and when by the terms thereof respectively they became due and payable; that one of said bills of exchange for the sum of forty-five hundred dollars, afterward, to wit, on the 17th day of March, 1869, became due and payable at the city of Chicago aforesaid; and the said Charles H. Hall, in pursuance of his said promise and undertaking to pay the same when it became due, and for the purpose of giving to the said defendants the money and means to pay the same and discharge themselves from liability thereon as the acceptors thereof, obtained the said bill of exchange in said third plea mentioned from the said bank in good faith and for a good and valuable consideration, and without the fraud, covin, deceit, and misrepresentation in the said replication stated; and afterwards, to wit, on the same day and year, at Cedar Rapids, to wit, at Chicago, endorsed and delivered the said bill of exchange to the said defendants, as in said third plea stated; all which matters and things the said plaintiff and said bank then and there well knew.

And the said defendants further aver that they received the said bill of exchange from the said Charles H. Hall in good faith, in the regular and due course of business, and for a good and valuable consideration, as the said plaintiff and said bank well knew; and afterwards, to wit, on the said seventeenth day of March, 1869, paid to the said bank the said bill of exchange so accepted by them, and which then, by its terms, became due. But the said bank, and

the said plaintiff, fraudulently directed the said Third National Bank of Chicago not to pay said bill of exchange in the said third plea mentioned to the said defendants, and then and there fraudulently stopped payment of the said bill of exchange without that, that the said defendants conspired, combined, or confederated with the said Charles H. Hall in manner and form as the said plaintiff, in said replication, hath alleged. And this the said defendants are ready to verify. Wherefore they pray judgment as in and by their said plea they have already prayed.

VI. Second Rejoinder to First Replication to Third Plea.

3. And for a further and second rejoinder to the said replication, the said defendants, by leave of the court, here first had and obtained, say that the said plaintiff, by reason of anything in that replication contained, ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred or precluded from having and maintaining their said set-off in said third plea mentioned, because they say that before the said sixteenth day of March, 1869, the said defendants had accepted for the said Charles H. Hall, and for his mere accommodation, and without any consideration, advantage, or benefit to the said defendants, a bill of exchange, drawn by him in favor of the said The First National Bank of Cedar Rapids, for a large sum of money-to wit, the sum of forty-five hundred dollars, which became due and payable by the terms thereof on a day certain after the date thereof, to wit, the seventeenth day of March, 1869, and which said bill of exchange the said Charles H. Hall, when they so accepted the same, undertook and promised the said defendants to pay and discharge at the maturity thereof.

Of all which matters and things the said plaintiff and the said bank had notice and well knew. And the said defendants further aver that the said Charles H. Hall, afterwards, to wit, on the sixteenth day of March, 1869, in pursuance of his said agreement to pay said bill of exchange, so accepted by the said defendants, and to place the said

defendants in funds, and to give them the means to pay said bill of exchange and discharge their liability thereon, obtained from the said bank, in the due and regular course of business, and for a good and valuable consideration, and not upon the consideration in the said replication alleged, the said bill of exchange in the said third plea mentioned, and the said Charles H. Hall then and there endorsed the same to the said defendants, who received the same from the said Charles H. Hall in good faith, in the regular course of business, and for a good and valuable consideration, and without any combination or conspiracy between the said defendants and the said Charles H. Hall, and without any knowledge or notice of the said fraud, covin, deceit, or misrepresentation in the said replication alleged.

Without that, that the said bill of exchange was obtained by the said fraud, covin, deceit, or misrepresentation in the said replication, alleged in manner and form as the same is therein stated. And this the said defendants are ready to verify; wherefore they pray judgment as in and by their said third plea they have already prayed, &c.

VII. First Rejoinder to Second Replication to Third Plea.

And the said defendants as to the said replication of the said plaintiff, by him secondly above replied to, the said third plea, say that by reason of anything in that replication alleged the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having and maintaining their said set-off in the said third plea mentioned, because, they say, that before the said sixteenth day of March, 1869, they, the said defendants, had accepted, for the mere accommodation of the said Charles H. Hall, a bill of exchange, drawn by him on them, and payable to the said First National Bank of Cedar Rapids, at a day certain therein mentioned, to wit, the seventeenth day of March, 1869, at Chicago, aforesaid, for the sum of four thousand and five hundred dollars, which bill of exchange the said Charles H. Hall, when the same was accepted, undertook

and promised the said defendants to pay at maturity, all which the said bank and said plaintiff well knew. And the said defendants aver that the said Charles H. Hall, in pursuance of his said agreement, and for the purpose of putting the said defendants in funds and giving them the means to pay said bill of exchange and discharge their liability thereon, for a good and valuable consideration, in good faith and in the due and regular course of business, and not by means of the fraud, covin, deceit, and misrepresentation in the said replication alleged, obtained from the said bank the said bill of exchange in the said third plea mentioned, and then and there endorsed and delivered the same to the said defendants for a good and valuable consideration, and the said defendants then and there received the said bill of exchange from said Charles H. Hall in good faith, in the due and regular course of business, and without any knowledge or notice of the said fraud, covin, deceit, and misrepresentation in the said replication alleged, without that, that the said defendants conspired, combined, and confederated with the said Charles H. Hall, as in the said replication alleged and stated, and this the said defendants are ready to verify; wherefore they pray judgment as in their said plea they have already prayed, &c.

VIII. Second Rejoinder to Second Replication to Third Plea.

And for a further and second rejoinder to the said second replication of the said plaintiff to the said third plea, the said defendants say that by reason of anything therein contained the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having and maintaining their said set off in that plea maintained, because, they say, that before the said sixteenth day of March, 1869, they had accepted another bill of exchange drawn by the said Charles H. Hall on them, and in favor of the said bank, for the sum of forty-five hundred dollars, and which, by its terms, became due on a day certain therein mentioned, to wit: on the seventeenth day of March, 1869, without any consideration, benefit, or advantage to them, but for the mere accommodation of the said Charles H. Hall, and which

said bill of exchange the said Charles H. Hall undertook and promised said defendants to pay and discharge at maturity; all which the said bank and the said plaintiff well knew.

And the said defendants aver that on the said sixteenth day of March the said Charles H. Hall, for the purpose of putting the said defendants in funds, and giving them the means of paying said bill of exchange and to discharge their liability thereon in the due and regular course of business, and for a good and valuable consideration, and not by confederation or conspiracy or combination with the said defendants, obtained from said bank the said bill of exchange in the said third plea mentioned, and then and there, for a good and valuable consideration, indorsed and delivered the same to the said defendants, as in that plea alleged; and the said defendants then and there received the same in good faith in the due and regular course of business, and without any confederacy or combination with said Hall, and without any notice or knowledge of the fraud, covin, deceit, or misrepresentation alleged in said replication, which the said plaintiff and said bank well knew.

And the said defendants further aver that afterwards, to wit: on the said seventeenth day of March, they paid the said bill of exchange so accepted by them to the said bank, but the said bank and said plaintiff directed the said Third National Bank of Chicago not to pay said bill of exchange in said third plea mentioned to the said defendants, and fraudulently stopped payment thereof. Without that, that the said bill of exchange in said third plea mentioned was obtained by fraud, covin, deceit, or misrepresentation, as in the said replication is above thereof supposed, and this the said defendants are ready to verify; wherefore they pray judgment, as in and by their said plea they have already prayed, &c.

To these rejoinders the plaintiff filed surrejoinder, as follows:

SURREJOINDER.

And the said plaintiff, as to the said several rejoinders of the said defendants to the said several replications of the plaintiff to the second and third pleas by the said de-

fendants pleaded, and to each and every of said rejoinders, saith that he, by reason of anything by the said defendants in said rejoinders or any thereof alledged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendants, because, he saith, that the matters and things in said several and respective rejoinders set forth, and each and every thereof, are untrue in manner and form, as the said defendants have in said rejoinders set forth; and this the plaintiff prays may be inquired of by the country, &c.

To this there was a joinder in issue by defendants, with a stipulation, as follows:

It is hereby stipulated that under the foregoing surrejoinder any matter, fact, or thing may be given in evidence which might be given in evidence if set out by special surrejoinder to all or any of said rejoinders. And further that the sufficiency in law of any and all matters set up in each and every rejoinder of said defendants as an answer to the respective replications to which the same is or are pleaded may, on the trial, be submitted to and passed upon by the court.

Before the trial commenced the defendants withdrew the plea of the general issue, (Record, 24,) and a jury was empaneled to try the issues joined. And after the close of the testimony, and the arguments of counsel, the Court instructed the jury as follows, every paragraph of which was excepted to by the defendants:

"GENTLEMEN OF THE JURY: The main, if not the only questions in this case have reference to the validity of a draft drawn on the sixteenth day of March, 1869, by the First National Bank of Cedar Rapids on the Third National Bank of this city, payable to C. H. Hall, and by him indorsed to the defendants, and by them pleaded as a set-off against the bills set out by plaintiff in his declaration."

And to that part of said written charge the defendants, by their counsel, did then and there in due form of law except.

"2. The issues are, under the pleadings, as follows:

"First. That the consideration for the said draft has wholly failed; of which the defendants had notice at the time they received the same, and that it is not now a valid demand against the said plaintiff in the hands of the defendants.

"Second. That the said draft was obtained from the said bank by certain fraudulent acts of the said Charles H. Hall, of which defendants were cognizant at the time they took the same, and that the said draft is void in the defendant's hands by reason of said fraud. If either of these issues are found for the plaintiff, he will be entitled to recover."

To which the counsel for the defendants did then and there in due form of law except.

3. "These questions are mostly questions of fact, to be determined by you under the evidence; that is to say, if the facts are made out by the proof, to your satisfaction, that the bank drew this draft upon the faith and consideration of an agreement between the plaintiff and Charles H. Hall, that the draft of Charles H. Hall of the same date, and the defendants, Sherman Hall & Pope, should be accepted by said defendants, and security given for the payment thereof, and for no other consideration, and that the said conditions have not been fulfilled; that is, if the draft on the defendants has not been accepted and secured nor paid, and that the said defendants had notice at the time they received said draft from the said Charles H. Hall of the agreement and consideration on which the same was issued, then you will be justified in finding that the issue of failure of consideration has been made out by the proofs."

To which the counsel for the defendants did then and there except in due form of law.

4. "So as to the other issue, that the said draft was obtained from the said bank by the fraudulent acts of the said Charles H. Hall, and that said defendants had knowledge of the said fraud at the time the draft came into their hands; that is, if you shall find from the evidence in the case that there was an understanding or collusion between Charles H. Hall and the defendants that Charles H. Hall should obtain said draft from the bank upon the

faith and representation that the five thousand dollar draft of said Charles H. Hall on the defendants of the same date would be duly accepted, and collaterals put up to secure its payment, and that at the same time it was well understood between said Charles H. Hall and the defendants that said five thousand dollars would not be accepted nor securities put up, then you will be justified in finding that issue for the plaintiff."

To which the counsel for the defendants did then and there in due form of law except.

5. "I will here say to you, what you have frequently heard during the progress of the trial, that the plaintiff has the burden of proof on both these issues, and is bound to make out his allegations of fraud and failure of consideration by a fair preponderance of proof; and unless the proof establishes one or both of these issues in favor of the plaintiff, your verdict will be for defendants. The draft in question appears fair and valid upon its face, and the labor to establish its invalidity upon one or the other of these issues is with the plaintiff.

6. "'Fraud is not to be presumed; it must be proven,' is a well-accepted maxim of the law; but this does not mean that fraud must be proven by direct and positive testimony. When men collude together to circumvent and defraud another, they generally take the precaution to conceal or obscure their intentions, frequently by a show of fair dealing and apparent uprightness. Their actions and the result of their actions in such cases are much more significant than what they say. What they do is altogether a far better index of their intentions than what they profess. Circumstances, as a general rule, are the only evidence by which fraud is established; and therefore while a jury should not be swift to assume fraud as proven by a single suspicious circumstance, yet, when a series of coherent circumstances all combine to lead the mind to the same natural or legitimate conclusion that fraud has been perpetrated or intended, then the jury is not only justified in finding the allegation of fraud proven, but it is their duty to do so."

To which the counsel for the defendants did then and there in due form of law except.

7. "You are the judges of the weight to be given to the testimony in this case. The evidence is complicated and contradictory in many important particulars, and where there is contradiction or conflict, it is for you to say which is the most worthy of belief. In doing this you should carefully consider the motives and the interest of the witnesses whose testimony is at variance, their opportunities for having correct knowledge and information and recollection of the facts whereof they testify, the probability of mistake on the part of the one or the other, and the causes which might induce either to testify falsely. All these are matters for your consideration in passing upon this contradictory testimony. It is not only desirable that jurors should reconcile evidence without assuming perjury against any witness, but it is their duty to do so if possible. But where it is impossible to reconcile the evidence, then you must say which is to be believed. It is not necessary that you should attempt to reconcile all the collateral or incidental matters which have been testified to in the case, and which may be contradictory, if you find running through the proof introduced on the trial a line of well-established circumstances, all of which naturally tend to prove a given allegation material to the issue, and which are not necessarily contradicted by the collateral facts and circumstances."

To which the counsel for the defendants did then and there except in due form of law.

8. "I have already told you that, if you find from the evidence that the draft in question was obtained by Charles H. Hall from the bank upon the faith that his five thousand draft of the same date on the defendants was to be accepted by the defendants and secured by collaterals, and that the defendants knew of such arrangement between Charles H. Hall and the bank at the time the draft came into their hands, and that such draft has not been so accepted or paid, then you should find the issue of failure of consideration for the plaintiff. The chief evidence, if my memory serves me right, and of this you are the judges, on this point is the evidence of the contents of a letter from Charles H. Hall to the defendants, enclosing said draft, bearing date the sixteenth day of March,

1869. There is some conflict of evidence as to the exact wording of that letter, but all agree, I think, that the letter did in plain terms notify the defendants that he, Charles H. Hall, had that day drawn a draft of five thousand dollars on them, and that they were expected to accept the same and put up collaterals."

To which the counsel for the defendants did then and there in due form of law except.

9. "As to how far the allusions, in this letter, to this draft gave the defendants knowledge of the course of dealing between Charles H. Hall and the bank, tend to show that the draft then enclosed was part of the proceeds of the five thousand dollar draft drawn on them, is for you to determine. It is also proper that you consider in this connection that, the day before this draft was made by Charles H. Hall on the defendants, said Charles H. Hall had, in the office of the defendants in Chicago, made a sale of all his grain in store in Cedar Rapids to McAffee, and that there would seem to be no resources belonging to the said Charles H. Hall with which to indemnify the defendants for this acceptance which he had made on them. You are to pass upon the pregnancy of all the facts and circumstances bearing upon the manner in which Charles H. Hall dealt with the bank, and also with the defendants, and decide from all the evidence on the point whether Sherman Hall and Pope did know or had sufficient notice and information on the subject to be equivalent to actual knowledge, at the time this bank-draft came into their hands and was placed to Charles H. Hall's credit, that this draft was made by the bank upon the agreement and consideration that the defendants were to accept and secure said draft of five thousand dollars; and I believe there is no pretense that it has ever been so accepted or paid."

To which the counsel for the defendants did then and there in due form of law except.

10. "In examining into the question whether the allegations of fraud have been made out by the proofs, you will carefully consider the relations existing between Charles H. Hall and the defendants; the fact that he is a brother of one of the defendants; that he was largely

indebted, not only to the present defendants but also upon an old account in favor of the old firm of Sherman, Hall & Pope; and you have the right to consider, not as conclusive but as a simple circumstance in the case, from your knowledge of human nature, whether he would not prefer that the losses of his business, if any, should fall rather upon the bank than upon his brother or his firm. You should also weigh well and carefully consider how far the transaction between Charles H. Hall and the defendants and McAffee, here in Chicago, in the preparation of the bill of sale to McAffee of all his, Charles H. Hall's, grain, with the guaranty by the defendants of the amount and value of that grain, (and as the guaranty is testified to by Charles H. Hall and not contradicted by any other witness, I assume that you will consider it proven, although that is for you to pass upon,) and the manner in which said Charles H. Hall and McAffee acted with the bank after this transaction, by concealing the same from the plaintiff, or at least withholding information thereof from him on the subject at the time this draft in question was obtained, although it would seem to have been information to which the bank or its officers were entitled, as it related particularly to the question of Charles H. Hall's ability to meet the draft he was then drawing—I say you are to say how far these circumstances prove or tend to prove the allegations of fraud made by the plaintiff, and with which they claim to defeat the bill in question."

To which the counsel for the defendants did then and there in due form of law except.

11. "So with the attempt on the part of Charles H. Hall to sell the Omaha grain; his leaving Chicago suddenly and secretly, so far as Mr. Weare was concerned, and his leaving Cedar Rapids on a freight train at night, when it did not seem to have accelerated his arrival at his place of destination; his sale of grain which he says in his testimony was worth from thirty-five hundred to four thousand dollars for fifteen hundred dollars on a time contract; it is for you to say, I say, whether there is any testimony to show or tend to show that these defendants knew anything of this effort of Charles H. Hall,

and whether it was part of a conspiracy and collusion between Charles H. Hall and the defendants, by which all Charles H. Hall's property was to be directly or indirectly transferred to the defendants to defraud the bank."

To which the counsel for the defendants did then and there in due form of law except.

12. "If all these circumstances, with others which I need not now particularize, when taken together, satisfy you that there was an intention to defraud the bank, and that the drawing of the five thousand dollar draft by Charles H. Hall and obtaining the forty-five hundred dollar draft was part of a scheme for defrauding the bank, then you will be authorized to find the issue of fraud for the plaintiff."

To which the counsel for the defendant' did then and there in due form of law except.

13. "Much stress is laid by defendants' counsel upon the date of the protest of certain drafts. I think there is no dispute as to the fact that these drafts were not formally protested for new acceptance until the eighteenth of March. But it is contended by the plaintiff that they were in fact presented for acceptance and acceptance refused on the sixteenth. I simply deem it my duty to say to you that the date of the protest is not of itself conclusive evidence that the demand for acceptances had not been made until that day. It may have been presented and acceptance refused at an earlier day, and the protest have been delayed. The evidence as to whether the drafts of the eleventh and twe.fth of March were actually presented for acceptance and acceptance refused on the sixteenth or eighteenth of March, is a di puted point, which it is for you to pass upon and not for the court. All I intend to say is, that the mere date of the certificate and notice of protest is not conclusive evidence that the draft had not been refused acceptance before that time."

To which the counsel for the defendants did then and there in due form of law except.

14. "To recapitulate, then, the real questions at issue are not whether the consideration of this draft has failed as against Charles H. Hall, or whether Charles H. Hall

was guilty of fraud in obtaining it, but whether the defendants at the time they took the draft from Charles H. Hall knew the facts out of which the draft originated to such an extent as to vitiate it in their hands; were they parties to Charles H. Hall's fraud, or did they know of his agreement that they should accept and secure his draft, and that the draft in question was part of the proceeds of his draft; or had they such knowledge of the circumstances out of which the draft originated that they must be reasonably supposed to have understood the whole of the matter? If this knowledge is not brought home to them, even if the fraud or failure of consideration, so far as Charles H. Hall is concerned, is fully proven, yet the plaintiff has not made out a case. While on the contrary, if the proof or a preponderance of the proof satisfies you that the defendants did know that the consideration of the contract in question was an agreement that the defendants should accept and secure and pay the five thousand dollar draft of Charles H. Hall, and that the defendants have refused to accept, secure, or pay, then the plaintiff will be entitled to a verdict at your hands on the issue of failure of consideration."

To which the counsel for the defendants did then and there in due form of law except.

15. "And if you find from the evidence that this draft was obtained by Charles H. Hall from the plaintiff by false and fraudulent representations that certain other drafts had been accepted by defendants and secured by collaterals, and also, after the amount of grain he, the said Charles H. Hall, then had in store in Cedar Rapids had been sold and disposed of by him, and that the said defendants knew at the time they received said draft that the said draft had been so fraudulently obtained, or if you shall believe from the evidence that said draft was thus fraudulently obtained by Charles H. Hall from the plaintiff in pursuance of a collusive and fraudulent conspiracy between the defendants and Charles H. Hall, with the express or implied understanding that the said five thousand dollar draft was not to be accepted, secured, nor paid, or as a part of the conspiracy between said Charles H. Hall and defendants, by which all the avail-

able property of said Charles H. Hall was to be transferred, directly or indirectly, to the defendants for the purpose of defrauding the plaintiff and his bank, then you will be authorized in finding the issues of fraud for the plaintiff."

To which the counsel for the defendants did then and there in due form of law except.

16. "You may find one or both these issues for the plaintiff, if you shall consider the proof sufficient; but either will be sufficient to entitle the plaintiff to a verdict on the drafts declared on."

To which the counsel for the defendants did then and there in due form of law except.

17. "Or if you find the evidence does not sustain the plaintiff on either of these issues, then the defendants will be entitled to a verdict.

18. "The form of your verdict will be: We, the jury, find the issues, as the case may be, for the plaintiff, and assess the damages at the amount of the drafts, and interest at six per cent."

To which the counsel for the defendants did then and there in due form of law except.

19. "But if you find the issues for the defendants, you will also assess damages on their draft at the rate of five per cent., in addition to finding the issues for the defendants."

The jury returned and rendered a verdict in favor of the plaintiff for the amount of the drafts sued on, with interest, &c., and thereupon the defendants filed motions in arrest of judgment and for a new trial, which were overruled, and judgment was entered on the verdict—to all which the defendants excepted.

The defendants bring the case to this court by writ of error, and assign errors as follows:

I. For that the said circuit court admitted improper evidence on the trial of the said action to be given to the jury against the objection of the defendants therein.

II. For that the said circuit court, on the trial of the said action, excluded from the jury proper and competent evidence offered by the defendants therein.

III. For that the defendants in the said action upon the pleadings therein had the affirmative of the issues, and were entitled to the affirmative throughout, and to open and close the argument of the said cause to the jury; notwithstanding which, the said circuit court, after the evidence was closed, permitted the said plaintiff therein to open and close said argument, against the objection of the defendants in said action.

IV. For that the said circuit court erred in its instructions to the jury, in that, that under the pleadings and evidence in the case, the said court submitted to the jury the question whether the considerations of the draft or bill of exchange pleaded in offset by the defendants in said action had failed; and in that the said court instructed the jury that they would be justified in finding that the consideration for said draft or bill of exchange had failed, if they should find the facts in that behalf stated in the charge; and in that, that the said circuit court, under the evidence given on the trial of said action, submitted to the jury the question of knowledge by said defendants of the fraudulent acts or representations of Charles H. Hall in obtaining said draft or bill of exchange, even though they should find that said Charles H. Hall was guilty of making any fraudulent representations or doing any fraudulent acts; and in that, that the said court charged and instructed the jury that if they found either of the issues enumerated in the charge that the plaintiff would be entitled to recover the amount of the accepted drafts declared on in his declaration.

V. For that the said circuit court, in its instructions to the jury, charged and instructed them as to the facts in the case contrary to the statute in such case made and provided; and for that, also, the said court in its charge instructed as to the effect they might give to certain facts assumed by the court to have been proved by the evidence; and for that, also, the said court in its charge instructed the jury that they might find certain matters of fact as to which there was no evidence given in the case,

and submitted to them questions of fact as to which there was no evidence before the jury to warrant or justify the court in submitting such questions, or the jury in finding the facts to exist.

VI. For that said circuit court erred in giving its charge to the jury upon the law and the facts.

VII. For that the said verdict of the jury is contrary to the law and the evidence, and should have been given for the defendants instead of for the plaintiff below.

VIII. For that the said court erred in refusing to set aside the verdict in this action and to grant the defendants a new trial therein upon their motion.

IX. For that said court erred in overruling the motion of the defendants below for an arrest of judgment upon the verdict of the jury.

ARGUMENT FOR DEFENDANT IN ERROR.

From the pleadings it will be observed—

I. That the action was commenced against the plaintiffs in error as acceptors of two bills of exchange, drawn on them in favor of the defendant in error, by one C. H. Hall.

II. That the defendants below *pleaded*—1, the general issue; and 2, *two* pleas of set-off, alleging that on the 16th of March, 1869, the plaintiff below drew his certain bill of exchange, in favor of the said C. H. Hall, and directed to the Third National Bank of Chicago, by which he directed the said bank, upon sight, to pay to the order of said Hall the sum of $4,500, which bill of exchange was indorsed to the said defendants below by the said Hall; that the said bill of exchange was duly presented for payment at said bank, and payment refused; and that the same was duly protested for non-payment, &c.

III. That the plaintiff below *replied* to these pleas, alleging—1, that the bills of exchange in the said pleas specified *were obtained by fraud, covin, and misrepresentation*

of the said C. H. Hall, setting out the false and fraudulent representations, and charging them to be false, and made with intent to deceive, and averring that the defendants below had notice of the said frauds and misrepresentations of the said C. H. Hall, *and confederated and combined with him to defraud the said plaintiff;* and 2, that the consideration upon which the bill of exchange specified in said pleas and proposed to be set off was obtained had failed in this, that the sole and only consideration of the issuing of said bill of exchange in the pleas mentioned was as follows: That at the time and place of drawing said bill of exchange the said C. H. Hall drew upon said defendants a bill of exchange for the sum of $5,000 in favor of the plaintiff, and then and there made fraudulent and false representations, which are set out in the replication; that plaintiff, relying upon said representations, and for no other consideration, accepted and discounted the said bill of exchange; that the representations of the said C. H. Hall were made with intent to deceive; that the defendants failed to accept and pay said bill of exchange for $5,000, and the same was protested for nonpayment; that the same is still due and owing to the plaintiff; and that the said defendants had notice of the fraud and misrepresentation of the said C. H. Hall, and confederated and combined with the said C. H. Hall to defraud the said plaintiff.

This replication, it will be seen, admits the execution of the bill of exchange pleaded as a set-off, and sets up as a defense thereto the fraud and misrepresentation of C. H. Hall, acting in collusion with the defendants. It is, in fact, a plea of failure of consideration as to the bill of exchange. To this replication the defendants rejoined, denying notice of the fraud of C. H. Hall and all combination and collusion with him, and alleging certain other

matters, all of which would have been admissible in evidence under a mere denial of the matters set forth in the replication. The plaintiff filed a surrejoinder, denying the new matter alleged in the rejoinder, tendering an issue, in which the defendants joined, with a stipulation that under the surrejoinder any matter, fact, or thing may be given in evidence which might be given in evidence if set out by special surrejoinder; and providing further, that the sufficiency in law of any and all matters set up in each and every rejoinder of said defendants, as an answer to the respective replications to which the same is or are pleaded, may, on the trial, be submitted and passed upon by the court. (Record, 24.)

Prior to the commencement of the trial the defendants withdrew their plea of the general issue. This, then, was the attitude of the parties before the jury. By withdrawing the plea of the general issue, the defendants admitted their liability on the bills of exchange, on which suit was brought. Their defense rested on establishing the liability of the plaintiff on the bill of exchange pleaded by them as a set-off. The plaintiff did *not deny* the execution of the bill of exchange thus pleaded by defendants, but admitted it, and his consequent liability to pay the same, unless he could establish his replication, pleading a failure of consideration and the fraud and collusion of defendants in connection with C. H. Hall in obtaining said bill of exchange. *It is clear that under the state of the pleadings the* ONUS *of proof rested on the plaintiff below.*

The errors assigned on the record are numerous, but the substantial questions to be determined may be reduced to three: 1, that the court below erred in allowing the plaintiff to open and close the argument to the jury; 2, that the court admitted improper testimony on the trial; and, 3, that the court erred in its instructions to the jury. These questions I shall consider in their order.

I. *That the court below erred in allowing the plaintiff to open and close the argument to the jury.*

The record (page 28) discloses that after the jury were impaneled the defendants claimed that under the pleadings they were entitled to the affirmative of the issues in the case, and the opening and closing of the argument. This claim was allowed by the court, the judge reserving the right to reconsider his ruling after the evidence was given to the jury. During the trial the judge became convinced that he had erred in this respect; that the burden of proof was on the plaintiff; and thereupon, when the testimony was closed, on motion of the plaintiff's counsel, he overruled his former decision, and awarded to the plaintiff the right to open and close the argument. (Record, 48.) If the statement of the pleadings I have given above is correct, it clearly shows that it devolved on the plaintiff to prove the truth of the allegations which impaired the validity of the bill of exchange pleaded as a set-off by defendants. On the face of the bill he was liable to pay it, and that liability could only be avoided by showing that it had been fraudulently obtained from him by defendants, acting in collusion with C. H. Hall, or that it had been issued without consideration, of which defendants had notice before they became the holders thereof. Unless he could establish one or both of these facts to the satisfaction of the jury, there must necessarily have been a verdict against him in favor of defendants. That these were the only issues, and were so understood by both the court and jury, is apparent from the record, (page 48;) for the judge expressly so charged the jury.

But suppose that we admit that he erred in this ruling, is it such an one as can be assigned for error? Is it not a matter entirely within the discretion of the court that tried the case? Upon this point the authorities are uni-

form that the question which party shall open and close the argument to the jury is a matter exclusively within the discretion of the court, and its decision cannot be assigned as error. The case of *Goodpaster* vs. *Voris et al.*, 8 Iowa, (Clarke,) 334, is a case in point, in which the court says: "The error first assigned is that the court refused to give defendants the opening and close of the case, which they claimed upon the ground that they had admitted the plaintiff's demand, and set up new matter. This is not a proper matter upon which to base an appeal, nor for the assignment of an error. Nor, if it were, has the defendant so admitted the plaintiff's cause of action as to allow his claim. The admission of the assignment is materially qualified; and, besides, the answer does not present a defense, nor yet an avoidance, as they sometimes term it; but they plead a set off, which is in the nature of a cross action."

This court has itself decided this question. In the case of *Day* vs. *Woodworth*, 13 Howard, 363, Grier, J., says:

"On the trial of this issue the defendants claimed the right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The Court ruled in favor of the defendants, to which the plaintiff excepted. This ruling of the Court is now alleged as error.

"Our attention has been pointed to numerous decisions of English and American courts on this subject, which we think it unnecessary to notice more particularly than to state that the question whether a defendant in trespass who pleads a plea in justification only has a right to begin and conclude has been differently decided in different courts. It is a question of practice only, and depends on the peculiar rules of practice which the Court may adopt. The English courts have regretted that an objection to the ruling of the Court at *nisi prius* on this question should ever have been permitted to be received as a ground for a new trial. But although a Court may sometimes grant a

new trial where the judge has not accorded to a party certain rights to which, by the rules of practice of the Court, he may be justly entitled, we are of opinion that the ruling of the Court below on such a point is not the proper subject of a bill of exceptions or a writ of error. A question as to the order in which counsel shall address the jury does not affect the merits of the controversy."

This decision, so far as I am advised, has never been overruled, and is now the law of this Court. This question is analogous to that which relates to the order of the admission of testimony, which all courts hold to be peculiarly within the discretion of the court trying the case, and which will not be interfered with by the appellate tribunal. (*The Phil. and Trenton R. R. Co.* v. *Stimpson*, 14 Peters, 448.)

II. *That the Court admitted illegal testimony on the trial.*

1. The exceptions under this head are quite numerous, and I shall consider them in their order. The first exception is taken to the following paper, offered in evidence by the plaintiff, and to which the defendants objected at the time:

"CHICAGO, *March* 15, 1869.

"I, Charles H. Hall, of Cedar Rapids, Iowa, have this day sold to David T. McAfee, of Marion, Iowa, the several lots of grain now in my warehouse and cribs at Cedar Rapids, Iowa, at prices as follows: 6,000 bushels of spring wheat, at 86 cents per bushel, amount, $5,160; 12,000 bushels oats, at price of 42 cents per bushel, amount, $5,040; 5,000 bushels corn, at price 35 cents per bushel, amount, $1,750; also a certain lot of 1,500 grain bags, at 30 cents each, amount $450; total amount of value, $12,400. All of which property I do hereby transfer to said D. T. McAfee, and agree to deliver the same to his order as he may direct.

"In consideration of the foregoing I have received, in full payment for the property sold, the promissory note of

D. T. McAfee, dated the 15th of March, payable at thirty days, for the sum of $12,400.

(Signed) "CHARLES H. HALL."

To this instrument was affixed a certificate of acknowledgment of the same date, before a notary public, as required by the laws of the State of Iowa, and a certificate of the county recorder of the proper county, that it was filed for record on the 17th of March, the day following its execution. This paper, it seems, was not the original bill of sale, but, as appears from the certificate of the recorder, was a certified copy from the records of his office. The grounds of objection to the admission of this instrument in evidence is not stated in the bill of exceptions. As, however, it is executed and acknowledged in the manner required by the statute of Iowa regulating the execution of bills of sale of personal property, its admission could not have been objected to for the reason that it was not properly executed. Its admission, therefore, must have been resisted on the ground, either that it was not admissible in evidence until the absence of the original had been accounted for, or that it was not pertinent to the issues involved. The presumption of law is in favor of the ruling of the Court below. If error exists, the *onus* is on the plaintiffs in error to make it apparent from the record. If the absence of the original bill of sale was accounted for, the certified copy was properly admitted as secondary evidence. The bill of exceptions does not show either the ground of objection or the absence of testimony which rendered the copy admissible in evidence. In the absence of this testimony, the error of the Court is not manifest, and its ruling must be presumed to be correct.

The *ground* of objection to the admission of testimony must be stated on the record, and this is particularly true where, as in this case, more than *one* ground may have

existed. And this is the doctrine of this court. In *Camden vs. Doremus*, 3 Howard, 515, the syllabus of the case reads as follows: "A naked statement on the record that the reading of a deposition, or copy of a record, was objected to, without disclosing the nature or ground of the objection, is nugatory and wholly ineffectual in a court of error;" and in the opinion of the court, Daniel, J., uses the following language:

"Before entering upon an examination of this agreement, and of the questions it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether as to its competency or relevancy, or at its regularity merely, that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds county against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection, we would remark that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that

this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere, certainly as without weight before an appellate court."

This decision covers completely the case at bar. Here the record shows that the certified copy of a written instrument, which the law, under certain circumstances, makes competent testimony, was admitted in evidence, and that, in the language of the bill of exceptions, "to the reading of which paper defendant's counsel objected; the court overruled the objection; counsel excepted," (record, 29;) thus demonstrating that the ground of objection was not pointed out to the court, or, if it was, not making that objection apparent to the appellate tribunal. And this decision, so far as I am advised, is still the law of this court, and under it this exception to the admission of the testimony in question is not well taken.

2. The next exceptions apply to the testimony of John Weare, the plaintiff, who was called as a witness for himself, and are thirteen in number. The grounds of objection to the testimony is not stated in, and is not apparent from, the bill of exceptions, except in a single instance. And this I suppose to be a sufficient answer to the assignment of error. It may be well, however, to go a step further and show the pertinency of the testimony objected to and admitted, and this involves a consideration of the issue to be tried and the facts of the case.

The issue was *fraud*, the plaintiff alleging on the one side, and the defendants denying on the other, that the defendants had colluded and combined with C. H. Hall

to defraud the plaintiff in the matter of the bill of exchange pleaded as a set-off. The facts, so far as they are disclosed by the bill of exceptions and affect the testimony of the witness, are substantially as follows:

Weare, the plaintiff, was the cashier of the First National Bank of Cedar Rapids, for whose use the suit was brought, the drafts sued on being in his favor as cashier of said bank, and the draft pleaded in set-off having been signed by him as such cashier. C. H. Hall was in business in Cedar Rapids, engaged in purchasing produce and shipping it to the defendants at Chicago for sale. Sherman Hall, one of the defendants, is a brother of C. H. Hall. In February, 1868, C. H. Hall made an arrangement with said bank by which he had a line of discounts from that time to November following, of from $5,000 to $7,000, which consisted of drafts drawn by him on defendants in Chicago, at sight and on time, which were accepted and paid as they matured from time to time. In November, 1868, C. H. Hall applied to the bank for an increase of his line of discount to enable him to purchase pork and produce, which was assented to by the bank. Under this arrangement, C. H. Hall was to draw drafts on time on Sherman Hall & Pope and Sherman Hall & Lebrand, the two firms of which his brother was a member, payable in Chicago, against his produce shipped to them, which the bank was to discount and place the proceeds to his credit, and he to draw it out as he wanted it in his business, to pay for pork or produce, and under this arrangement C. H. Hall's line of discount between November, 1868, and the 20th or 25th of February, 1869, ran up to from $20,000 to $25,000.

In reference to the business of C. H. Hall with the bank, the witness was asked this question:

"Do you remember what the footing up of the books showed was the gross amount of his business during the

time he did business with the bank, and how much it was between November, 1868, and March 16, 1869?" Record, 30.

This question was objected to, the objection overruled, and the witness permitted to answer, who stated:

"From February, 1868, to November, $120,000; from November, 1868, to March 16, 1869, $340,000. The line of discount from February to November, 1868, did not vary much from $5,000 to $7,000. The time on which the drafts were to be drawn were to be according to Hall's necessities, ten, fifteen, twenty, or thirty days; not very large amounts at thirty days; and he did draw in that way." (Record 30.)

To the ruling of the court admitting the testimony, the defendants excepted, and this constituted their *first* exception to Weare's testimony. Now, it will be seen at once that this question might have been objected to on two grounds: 1. That the books of the banks were the primary and better testimony, and the witness's statement, unless it were shown that the books could not be produced, was but secondary evidence; and 2. That this testimony was not admissible against the defendants till some evidence had been adduced connecting them with C. H. Hall, and showing them to be in collusion with him. Now, which, if either, of these was the ground of objection presented and urged to the court as the ground of objection to the admission of the testimony? If either or both had been urged, the defect in the testimony could have been supplied, or in the language of this court, in *Camden vs. Doremus*, "might have been easily cured." As the record does not show the ground of objection, nor the bill of exceptions purport to contain all the evidence offered in the course of the trial, the presumption is that the objection taken by the defendants to the testimony was removed and the evidence properly admitted. But

not to rest this matter upon purely technical objections, it is sufficient to say that this testimony was merely preliminary to what was to follow, and that the other evidence in the case fully connected the defendants with the alleged fraud and collusion.

The next twelve exceptions go to the further testimony of the witness Weare, and that the court may see the whole of the testimony of the witness, subsequent to the above question and answer, we quote from the bill of exceptions as follows:

1. He further stated that when Charles H. Hall applied for an increase of discounts in November, he asked him if he had consulted with Sherman Hall & Pope, and Sherman Hall & Lebrand about it.

(The counsel for the defendant objected to his stating what was said by Charles H. Hall to him, the court overruled the objection, and the counsel for the defendants excepted.)

Answer. He showed me a letter from Sherman Hall & Pope to him; the upper part of it was a statement of sales.

2. (Defendants' counsel objected to the witness giving the contents of the letter, on the ground that it was not the letter of the defendants now in their possession.

The court overruled the objection, the counsel for the defendants excepted, and the witness answered.)

A. He ran over the account of sales, which was, that they had made sales, very favorable sales, and then the letter says: "As to your desire for us to furnish you money to enable you to go into further operations in pork, etc., we are totally unable to do so. We have, in every sense of the word, all we can do to get a line of discount to answer our purposes. You are connected there with the First National Bank and you can make an arrangement with them whereby you can draw on us, and get an extension of your line of discount, that will answer your purposes. We will accept as we have done and will pay." Upon that, and on consultation with some members of the bank, it was thought we would try and accommodate him.

I told Mr. Hall about Feb'y 20 or 25, 1869, this pork business is through, and I want you to come back to your old basis, $5,000 to $7.000. He did not do it; kept on drawing on Sherman Hall & Pope & Sherman Hall & Lebrand; drafts were discounted and proceeds placed to his credit, and he took it out as wanted, and it got to March without any checking up, and finally told him "You must reduce your discount." I remember distinctly that I thought, "Now, Mr. Hall understands this, and there can be no mistake about it," and that he knew slower or faster.

3. (To which statement the defendants objected, the court overruled the objection, and the counsel for defendant excepted.)

The witness continued: My view is to convey to the jury just as the thing transpired. I supposed he understood, and he acquiesced in my demand upon him.

4. (To which the counsel for defendant objected, and the court overruled the objection, and the counsel for the defendant excepted.)

And he continued: He came in in a few days and said he had a project with his brother and associates to put in a bid for Government contract for delivering a large amount of oats on the Missouri river to supply Indians and troops, and wanted to continue the loan he already had. I interrogated him in regard to the means he had on hand already. He said he thought on the whole he should have about $15,000 worth of produce in store and in the country. He was not accurate about it. My memoranda show that it was $15,000 to $25,000.

I finally said to him that changed things. While he was shipping to Sherman Hall & Pope, it enabled them to meet his draft on them. But this grain he proposed to buy was to be held at Cedar Rapids, or shipped west of the Missouri river, and if it was lost by fire or otherwise it might affect their responsibility and ability to meet his drafts; "hence you must arrange that when they accept your drafts they must put up collateral securities that they will pay to the satisfaction of Mr. Parsons, cashier of 3rd National Bank, Chicago." He agreed to do it. He did not, but kept on drawing on them and using the pro-

ceeds. And I finally insisted that the arrangement for collaterals should be carried out. March 11th and 12th he presented drafts to the amount of $13,000; there was one of $10,000 which the bank discounted, and I told him, "Before we go any further you must go into Chicago and arrange this matter of collaterals." He and I came to Chicago on the 13th March, and about 3 o'clock p. m. I went with Charles H. Hall to Sherman Hall and Librand's office to see Sherman Hall. He was not there. We staid half to three-quarters of an hour, and learned he had gone to the stock-yards and would not be back till late. We made an appointment to meet that evening at the Sherman House. I went; met Charles but not Sherman Hall. He said he had arranged the matter and it would all be fixed up. I had to go home that night, and went on the 11 o'clock train. He said he would remain and fix the matter up.

The drafts of 11th and 12th were not all sent in immediately. Some were sent on the 13th, and one was not sent till the evening of the 15th, and there was a delay in mails at Clinton by which the drafts sent the 13th and that sent 15th came into Chicago together.

March 16, when I came to the bank, in the afternoon, the assistant cashier, Mr. Dean, handed me Charles H. Hall's bank-book with a $5,000 draft on Sherman Hall & Pope for discount. Hall came in and said, "I want that draft discounted." Talked about going to Chicago, and that I had yet to learn that collateral security had been put to the drafts he had drawn and was to draw. He said, "That has been done; I fixed that up before I left, and the whole batch has been accepted;" that he told his brother to telegraph him when it was done, so he might come in and make me satisfied, and he had a telegram from his brother saying that the whole $13,000 had been accepted and collaterals put up. This was along two or three o'clock p. m. I then asked Hall how much grain he had. He said about 19,000 bushels of oats and about 12,000 of corn and wheat each, making in all, he thought, about $20,000 to $21,000 he had.

5. (Defendants' counsel objected to this witness giving this conversation. The court overruled the objection and the counsel for defendants excepted.)

He also said that before he went to Chicago Chas. H. Hall took him through warehouse; he climbed up ladders and looked down into dark bins till his head swam, and he felt he did not know much that was there; that there was one large pile of oats in the chamber that made up this large amount of 19,000 bushels. He also said, "I finally told him after hearing all he had said that we would take this one draft, which we there upon discounted. David I. McCaffee was in the bank and witnessed the transaction, and I felt that he was interested in it. It was about half past three. About four o'clock a telegram was brought in."

6. (The defendants' counsel objected to the witness stating the contents of the telegraphic despatch. Whereupon the following questions were asked the witness, to which he gave answers as follows:)

Q. Have you the telegram?

A. No, sir.

Q. Do you know what has become of it?

A. It was burned.

Q. Do you know whether the telegram is now accessible—whether it now can be produced?

A. So far as I know, it can not.

Q. What is your best knowledge as to where it now is or what has become of it, rather?

A. Burned in the fire.

Q. Do you think that it was among the files in this case?

A. That is my impression.

Q. From what source do you get any information on that subject?

A. A portion of my papers, with my books, I put in charge of my son, down here on the corner of Water and La Salle streets, and he put that in his safe, and they remained there until the fire and were lost.

Q. You think it was lost with these papers?

A. That is my impression.

Cross-examined by Mr. Storrs, the counsel for defendant:

Q. Did you ever have that despatch here?

A. It was my impression we had it here.

Q. Are you certain about that?

A. No, I am not.

Q. If you had it here before, why didn't you produce it?

A. I say my impression does not enable me to say why we did not.

Q. Have you looked after it at all?

A. I looked in my papers here, immediately after the fire, and in the talk with my son.

Q. Have you looked at home for it?

A. No, sir.

Q. And you are not certain whether you had it here or not?

A. My impression is I had everything here pertaining to this suit.

Q. Do you have any definite recollection as to whether you ever had the paper here or not?

A. I can not state positively.

Q. But you are certain it was never offered in evidence at all, are you not, anywhere during this trial?

A. I don't remember it was.

Q. Don't you remember in the first trial, for instance, it was not?

A. I don't know, but my impression is it was not.

Q. And you have not looked at home for it at all?

A. No; I thought it was here with my son.

The court. State the contents of the despatch.

(Excepted to by the defendants' counsel.)

A. The telegram stated that the drafts of Charles H. Hall on Sherman Hall & Pope were protested. I thereupon telegraphed Parsons here not to pay the $4,500; it was a fraud. I went immediately to Charles H. Hall's warehouse; found he had gone to Marion, six miles distant. I went to Marion, did not find Hall, but I found that McAffee had purchased the property, and I then returned to Cedar Rapids; went to Charles H. Hall's rooms. He said he had sold all his grain to McAffee. I told him I had a telegram that the drafts are not accepted, and no collaterals are put up; "Give me the $4,500 draft you got from the bank." He said he had sent it to Sherman Hall & Pope. I asked how much he got for the grain. He said $2,000 in cash & $12,000 in short paper. I said, "Give me that paper." He said, "I have sent that to Sherman Hall & Pope." I told him he must go to Chi-

cago with me and arrange the matter with them. He hesitated, but finally agreed to meet me at the train & go. We came on to Chicago that night, March 16; arrived here on the 17th, towards noon; went to Sherman Hall & Pope's office about two p. m.; found Charles Hall & Sherman Hall talking together. Sherman Hall came forward to talk to me. I asked if anything had happened. "Has not your brother a right to draw these drafts?" He said, "Yes." I said, "Is there any reason why these drafts are not paid?" He said, "We will fix this thing up; there will be no trouble about it." I went away, and returned at five at their request; found them there talking. They separated, and Sherman Hall came forward & said, "My partner has been out all day; have not not talked this matter over much. You cannot go out to-night. These drafts need not be protested, need be no fears about them, and we will fix this thing up. You come in in the morning about 10 o'clock." I went in the morning. Sherman Hall handed me a letter from Charles, written the night previous, saying he could not do any good staying; would leave for Iowa that night, and they must arrange the business here. I asked if he intended to do as he agreed. He said, "Yes; I am very much interested in my brother. Mr. Pope feels a little sensitive in some things. I desire to have everything satisfactory always, and I have concluded that you take these drafts with you. I will go out. We will look over Charles' matters. Sorry you have had this trouble, but I will fix it up out at Iowa. I will meet you at the train." This was the 18th, about noon. I was directed from Cedar Rapids to protest the drafts. I did so; think I took drafts with me. We arrived at Cedar Rapids in the morning; agreed to meet at Charles Hall's rooms about 10 o'clock. I saw Sherman Hall about that time. He said he had not seen his brother; would like to meet me at 2 o'clock. In a few minutes I met on the street.

7. (Defendants' counsel objected to his stating what he learned on the street. Court overruled objection, & counsel for defendants excepted.)

Witness continued: I learned on street that Charles Hall had left for Council Bluffs, & had been gone from

night before. I went to Sherman Hall; told him he had been to his brother's room; "Don't you know he on his way to Council Bluffs? You have made appointment for 10 o'clock. I perhaps can excuse that, but the 2 o'clock appointment, after you knew he had gone to Council Bluffs. This is the first time I have had occasion to say my confidence is shaken in you; that there is iniquity in you; that I am a dupe." He said, "It matters very little what you think. If you beat me at my own game, why then I have nothing to say." After Charles Hall was brought back, I offered Sherman Hall, if he would give me McAffie's note, and endorse Charles Hall's note for the balance, $12,000 or $15,000, by his firm, Sherman Hall & Pope, I would give them all the time they could reasonably ask. He said, "The thing is a good deal mixed. I shall have to go home & consult Mr. Pope before I do anything more."

Admitted that the books of Sherman Hall & Pope were destroyed in the fire.

Weare further stated that Charles Hall had been shipping grain to Omaha, and a short time before had drawn on a house there for $2,500, which was protested, and it has never been paid. There remains unpaid of Charles Hall's draft on defendants and this Omaha draft between $21,000 & $25,000. The bank has received from sale of Charles Hall's property, seized under attachment, a little over $4,000.

Question. Did you have any conversation with McAffee on the 18th March as to how much he had paid and what amount of notes he had given Charles Hall for this property?

8. (Objected to by defendants' counsel. Objection overruled by the court. Excepted to by defendants' counsel.)

Answer. I guess the 21st of March I saw McAffee; he had taken possession of the warehouse. Hall was not present when I had this conversation.

(Counsel for defendants objected to his stating the conversation. Court overruled the objection, and counsel for defendants excepted.)

Answer. I asked, "Have you purchased this grain?" "I have," said he. I said, "What did you give for it;

how came you to purchase it?" He said, "I was urged to buy it by Sherman Hall & Pope and Charles Hall, and I thought there was some money in it, and, like all the world, I bought it. I wanted to make some money. If you will give me $2,000, I will give it up." I asked him what he paid; he was in doubt in regard to it; said he paid $2,000 in money and had provided satisfactorily to Sherman Hall & Pope & Charles Hall for the balance.

Question. Did you ever hear McAffee make any statement subsequent to that whether he received the $2,000?

9. (Objected to by counsel for defendants. Court overruled the objection, and counsel for defendants excepted.)

Answer. A day or two after the grain was attached he said to me that he had got me into that matter; didn't understand it just at the time, but that he was not out of pocket any; that he had made Sherman Hall and Pope refund to him the money which he had paid, and the notes had been returned, so that he was just where he begun.

Q. I will ask you now to refresh your recollection whether he didn't say he never had paid $2,000 in money, and that he had got his notes back.

10. (Objected to by the counsel for defendant. Objection overruled, and the counsel for defendant excepted.)

A. I don't recollect that he did say in regard to the money; it was spoken of, but he did not speak about the notes.

Q. State whether or not Mr. McAfee ever took any legal steps or otherwise to keep possession of this grain after it was attached by the bank.

11. (Questions objected to by the counsel for defendant. Objection overruled, and counsel for defendant excepted.)

A. I knew he did not, and he assured me he should make no no effort whatever.

(Counsel for defendant moved the court to hear the answer ruled out as not responsive to the question.)

By the COURT. The testimony can all be taken subject to the general objection.

(To which the counsel for defendant excepted.)

It is admitted by the counsel for defendants that the

letter written by Charles H. Hall to Sherman Hall and Pope on the 16th day of March, enclosing the $4,500 draft to them, was burned up in the fire of October 9th, 1871, and the witness was asked to state the contents of that letter, and he stated it as follows:

The letter bore date on the 16th of March. The enclosure was expressed in form: "Herewith find $4,500 to my credit. I have this day drawn on you, through the First National Bank, a draft for $5,000 in favor of John Weare, and it has been discounted by the First National Bank, and he (underscored) expects you to put up the collaterals."

Q. In any of your conversations with Charles H. Hall was anything said with regard to the amount of his indebtedness? If so, state what was said about his indebtedness and when that conversation was.

(Objected to by counsel for defendants. Objection overruled, and counsel for defendants excepted. The witness answered:)

When he first made his application to me for money and to do business with the bank, among other things I asked him, "How do you stand in the world? How is your pecuniary matters? What is your obligations? Do you owe much or not?" He said to me, "I owe about $5,000 aside of a mortgage of $10,000 which is on my warehouse; that is all the indebtedness there is standing against me." He said, too, that that $5,000 was made up of money that he had borrowed, and was in transit to his credit, and had not been brought around and finally closed up, but he really felt that he did not owe much of anything except the $10,000 mortgage. I knew the ground and warehouse very well, but I don't know that I could be called a good judge of the property.

Q. What, in your judgment, was it worth?

(Objected to by defendants; objection overruled, and exception by the counsel for defendants.)

A. I think the warehouse at that time was worth twelve or fourteen thousand dollars. Twelve would be a low rate, and fourteen would be called a pretty full price. On the 17th or 18th March I asked Sherman Hall what his brother owed them. He said $7,000.

Q. Do you know whether Mr. Dean, your assistant cashier, heard the conversation between you and Charles Hall?

A. He says he did not.

12. (Counsel for the defendants object to the answer, and move to strike it out.

Court refused. Counsel excepted.)

On his cross-examination he said, "I am not the owner of the drafts sued on; they belong to the First National Bank of Cedar Rapids. The bank owns them, and I have no pecuniary interest in them except as a stockholder. I am not sure I owned any stock when these drafts were discounted. The $5,000 draft of March 16, 1869, was sent in a letter that evening to the Third National Bank, Chicago, for collection. The letter, after referring to the draft, was, in substance, as follows: 'Mess. Sherman Hall & Pope, and also Mess. Sherman Hall & Librand, are to place in your hand satisfactory security for this and all paper accepted by them in the future. If this is not accepted and secured as above, please telegraph me.'"

The plaintiff read as evidence entries on the ledger of the First National Bank of Cedar Rapids, the cash-book, bills payable and bills receivable, book from the bills receivable, book on entry of the draft of Charles Hall on Sherman Hall & Pope, dated March 16, 1869, for $5,000, and a statement that judgment was recovered on it on March 7, 1870, against Charles H. Hall in the attachment suit before referred to.

It is a well-established principle of the law that where parties conspire to commit a crime, or perpetrate a fraud, or where they are associated together for any illegal purpose, the acts or declarations of one of the parties in pursuance of the common design, and which are a part of the *res gesta*, are admissible in evidence against the others. In the case of *The American Fur Co.* vs. *The United States*, 2 Peters, 358, decided in 1829, Judge Washington, delivering the opinion of the court, says: "We hold the law to

be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the others." In the later case of *Lincoln* vs. *Claflin*, 7 Wallace, 132, Field, J., says: "The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs." I might refer to innumerable State decisions in support of this doctrine, but as it is the recognized law of this court, it would be a work of supererogation to do so, and I therefore forbear.

Though the grounds of objection to Weare's testimony, to which exceptions were taken, are not stated in the bill of exceptions, as they should have been, the presumption is that the defendants objected to the declarations of C. H. Hall, either on the ground that he was not a party defendant, or that they were made in the absence of the defendants. If C. H. Hall was a party to the fraud, and the statements made by him were so made in pursuance of the common design, then there can be no doubt as to their admissibility, even though the testimony may have been offered anterior to any proof showing any connection between C. H. Hall and the defendants. Weare's testimony itself connects the defendants and McAfee, who fraudulently purchased C. H. Hall's property, with the fraud, and his testimony is confirmed by the subsequent witnesses. The evidence taken together establishes the following facts:

At the close of the pork season, in February, 1869, Weare, as cashier of the bank, required C. H. Hall to return to his former line of discount, ranging from $5,000

to $7,000, which he neglected to do, but kept on drawing upon the defendants, and it ran till March without checking up, when Weare finally told him that he must reduce his discount. In that month C. H. Hall represented that he had a project with his brother and associates to bid for a government contract for supplying the Indians and troops, and wanted to continue the loan he had already made. Weare assented to this, on the condition that the defendants should put up collateral securities to secure the drafts drawn by C. H. Hall, to which the latter assented. Prior to the 11th of March this condition had not been complied with, though C. H. Hall kept on drawing drafts and having them discounted at the bank. On the 11th and 12th of that month he presented drafts to the amount of $13,000—one for $10,000—which the bank discounted, and Weare then insisted that before they went any further C. H. Hall must go to Chicago and arrange the matter of collaterals. On the 13th the two went to Chicago, and visited Hall & Lebrand's office to see Sherman Hall. Not finding S. Hall there, an appointment was made to meet that evening at the Sherman House. S. Hall did not make his appearance, but Charles met Weare, and assured him that he had arranged the matter, and it would all be fixed up. Weare returned to Cedar Rapids that night, leaving Charles in Chicago. Up to this time Weare had not seen, so far as the bill of exceptions discloses, either of the defendants. The drafts drawn on the 13th of March did not reach Chicago till the 16th, and were protested for non-payment on the 18th. By referring to the bill of sale to McAfee, it will be seen that it was dated Chicago, March 15, 1869; that it was acknowledged in Linn county, Iowa, on the 16th; and that at 8 o'clock on the morning of the 17th it was filed for record in the recorder's office of that county. Pope, one

of the defendants, testified that he wrote the bill of sale "on the afternoon or evening of March 15," at the request of Charles Hall; that McAfee was not present when it was written; and that it "was not executed or delivered when Charles Hall and McAfee left the office—thus showing that Hall and McAfee were together in Chicago in the afternoon or evening of the 15th of March. It further appears that the bill of sale was not only written by Pope, one of the defendants, but that Sherman Hall, the other defendant, was consulted about and encouraged the sale, and the firm gave a guaranty of the amount and value of the grain. It is also shown by the testimony of Charles Hall himself that the note for $12,400 executed by McAfee, as the consideration for the sale of Charles Hall's property mentioned in the bill of sale, does not express the true amount; for he states as follows: "That after they"—that is, McAfee and Charles Hall—"got to Cedar Rapids McAfee looked over the warehouse, estimated the grain, and was willing to close the trade at $10,400, and gave his note for $12,400, and drew on Sherman Hall & Pope for $2,000. That when Pope drew the bill of sale, if McAfee closed the trade, I would send the notes to them to put up as collaterals. At Marion I signed the bill of sale, McAfee made his notes for $12,400, drew on Sherman Hall & Pope for $2,000, deposited the note with Mr. Stevens, a banker, until he heard from Chicago that the $2,000 draft had been paid, when Stevens was to send the note to me or Sherman Hall & Pope. The note was payable to my order, and when I left I indorsed it."

On the next day, the 16th, C. Hall and McAfee appeared together at the bank with a draft for $5,000 on defendants for discount. Weare objected that he had yet to learn that collateral security had been put up to secure the drafts C. Hall had drawn and was to draw. To this Hall replied

that that had been done, and that he had a telegram from his brother that the whole $13,000 had been accepted, and collaterals put up. Weare being still distrustful, asked Charles Hall how much grain he had, to which Hall replied that he had about 19,000 bushels of oats and 12,000 of corn and wheat each, making in all, he thought, about $20,000 to $21,000 he had. This conversation took place in the presence and hearing of McAfee, who had a bill of sale of that very property at the time, and who made no disclosure of the fact, thus showing collusion between him and Charles Hall. Upon this representation of Hall, Weare consented to take this $5,000, and which the bank thereupon discounted. About 4 o'clock on the same day, the bank received a telegram from Chicago that the drafts of Charles Hall on defendants were protested. Weare then went in pursuit of Charles Hall, found that he had gone to Marion, and followed him there, but failed to find him. Here he learned that McAfee had purchased the property, and Weare returned to Cedar Rapids, where he found C. Hall. A conversation took place between them. Weare demanded the $4,500 draft, the same being the draft pleaded in set-off. C. Hall said he had sent it to defendants. Weare then asked how much he had got for the grain. Hall answered $2,000 in cash, and $12,000 in short paper. Weare then demanded that paper, and the answer was that it had been sent to the defendants. Weare then insisted that Charles Hall should go with him to Chicago and arrange the matter with defendants, to which Hall, with some reluctance, consented. That night they started, reaching Chicago the next day, the 17th. When Weare went to the office of the defendants, he found Charles and Sherman Hall in conversation, and here for the first time he met the defendants. Sherman Hall promised that the matter should be satisfactorily arranged;

that the drafts need not be protested; there need be no trouble about it. Another interview was arranged for at 5 o'clock. Weare returned at the hour appointed, and found the two brothers again in conversation. Sherman Hall represented that his partner had been absent all day, again promised to fix the thing up, and made another appointment for next morning at 10 o'clock. Returning next morning Weare was handed by Sherman a letter from Charles, written the previous night, saying he would leave for Iowa that night, and they must arrange the business in Chicago. Weare then asked Sherman if he intended to do as he agreed, to which he replied: "Yes, I am very much interested in my brother. Mr. Pope feels a little sensitive in some things. I desire to have everything satisfactory always, and I have concluded that you take these drafts with you. I will go out. We will look over Charles' matters. Sorry you have had this trouble, but I will fix it up out in Iowa. I will meet you at the train." They arrived at Cedar Rapids on the morning of the 19th of March, where they found that Charles Hall had started for Council Bluffs the night before on a freight train, where he sold property worth from $3,500 to $4,000 for $1,500, and where he was arrested and brought back to Cedar Rapids. Finding that Charles had absconded, and believing that Sherman Hall was cognizant of his flight, and had deceived him, Weare went to him and said: "This is the first time I have had occasion to say my confidence in you is shaken; that there is iniquity in you; that I am a dupe." To this Sherman Hall replied: "It matters very little what you think. If you beat me at my own game, why then I have nothing to say"—which language can bear no other construction than an avowal of participation in the fraud which had been practiced upon Weare and the bank.

It further appears from the testimony that an examination of the books of the defendants, and of a former firm of Sherman, Hall & Pope, showed that Charles H. Hall was indebted to them in the sum of $24,000, the greater amount of which was due the defendants, which indebtedness existed when Charles commenced business with Weare's bank; that the book showed an increase of indebtedness between them and the credit of the drafts of the 11th and 12th of March of $3,000 to $4,000; that after that the account was credited with proceeds of the drafts of 11th and 12th of March, $11,500, amount of bill of exchange plead as a set-off by defendants, $4,500, and with McAfee's note, $12,400, making a total of $28,400; that before the credit of the McAfee note a balance had been struck, and there was a debit against Charles Hall; that the McAfee note was entered in pencil, very soon after the 17th of March, *obliquely across the page*, and showed a balance of about $100 to the credit of Charles Hall; and that the entry of the McAfee note was not transferred from any other book.

On the 21st of March Weare had a conversation with McAfee, who had taken possession of Charles Hall's warehouse, which is thus related by Weare: "I asked, have you purchased this grain? I have, said he. What did you give for it; how came you to purchase it? He said, I was urged to buy it by Sherman Hall & Pope and Charles Hall, and I thought there was some money in it, and, like all the world, I bought it; I wanted to make some money. If you will give me $2,000 I will give it up. I asked him what he paid; he was in doubt in regard to it; said he paid $2,000 in money, and had provided satisfactorily to Sherman Hall & Pope and Charles Hall for the balance." After this conversation the grain was attached by the bank, McAfee made no defense, and the bank realized

from the sale about $4,000. After the grain was attached McAfee, in a subsequent conversation with Weare, admitted that defendants had refunded to him the money he had paid, and the note had been returned, so that he was just where he began. It is also shown that the bank lost by its transactions with Charles H. Hall between $21,000 and $25,000.

From this condensation of the main facts, without going into the minor details, which but confirm the theory, it must be apparent that all these parties, the defendants, Charles H. Hall, and McAfee, were participants in the fraud, and were all more or less benefited by it. C. H. Hall was benefited by the money he received from the bank, and which he stills owes them; McAfee was benefited, or hoped to be, by the fraudulent purchase of property which C. H. Hall valued at $20,000 and upward for $12,400, most of it on time; and the defendants were benefited by receiving McAfee's note, which they applied to the liquidation of Charles Hall's indebtedness to them. And this fact of participation by all the parties in the fraud once established, the declarations of any one of them, made in carrying out their design, or in explanation of their conduct, come within the rule laid down in the cases cited, and is competent testimony against all the conspirators.

If it is contended that the court erred in permitting the witness Weare to state the contents of a letter, purporting to come from the defendants, which Charles Hall read to him, without accounting for the absence of the original letter, it is a sufficient answer to say: 1. That that does not *appear* to have been the ground of objection, nor does the bill of exceptions negative the idea that no such evidence was offered; and 2. That the statements which the letter is supposed to have contained are but the state-

ments of Charles Hall himself; and on his examination as a witness he made no denial of having received such a letter from his brother, or of having made the statements to Weare that he represented it to contain. Even if it was error to admit secondary evidence of the contents of this letter, the error is not a material one, for, without the testimony relating to it, there is abundant testimony connecting the defendants with the alleged fraud, and this being so, the error worked them no injury.

The same remarks apply to the admission of the declarations of McAfee, made to Weare, after the property conveyed by the bill of sale had been attached, and after the fraud was perpetrated. The fraud is established without his admissions, and the proof of them in no way injured the defendants below. The sale to McAfee bore all the ear-marks of fraud, and his subsequent confession of it, and boast that "the note had been returned, so that he was just where he began," added no strength to the case made by the plaintiff.

The exception, which I have numbered 6, and which relates to a telegram received by the bank on the 16th of March, stating that the drafts of C. H. Hall, drawn on the defendants, had been protested, is not well taken. The testimony of Weare shows sufficiently that the original telegram had been destroyed, and the witness was properly permitted to testify as to its contents. The record in the case discloses that all the original papers in the case had been destroyed in the great fire in Chicago, and the Court was, doubtless, well satisfied that this paper had been destroyed with the others. I know of no rule of law which requires a party to apply to the telegraph office for the original dispatch, and even if there were such a rule, the Court well knew that in this case it would have been unavailing—all the offices having been burned in the great fire.

The next exception goes to the testimony of Wm. P. Black, who testified as to the account of Charles H. Hall with the defendants, as shown by the books on a former trial, the books themselves having been destroyed in the great fire. He went on to show that it appeared from said books that Charles H. Hall was largely indebted to defendants; that there had been a balance struck; that then the McAfee note "*was entered in pencil, very soon after the 17th of March, obliquely across the page*," making the books then show a balance of about $100 to the credit of Charles Hall; and *that the entry of the McAfee note was not transferred from any other book.* This testimony was objected to as *immaterial*, but the objection was overruled, and very properly. It was material, and the inference may be fairly drawn from it that Charles Hall was thus credited with the amount of the McAfee note, when he and Charles Hall were in Chicago on the 15th of March, and before the sale was completed by the acknowledgment of the bill of sale by C. Hall, on the 16th, at Marion. This entry is one of the strongest circumstances to connect the defendants with the fraud, for it shows that they had applied the proceeds of the sale of Charles Hall's property to the payment of his debt to them before the sale had been actually accomplished. It thus establishes the *motive* which led them into the conspiracy, and disproves the pretense of Charles Hall that he made the sale in order to obtain collaterals to secure the drafts he might draw on the defendants.

III. *That the court in its instructions to the jury.*

This court will perceive, upon an examination of the record, that the charge of the judge below is long, full, and complete, and that every paragraph was excepted to by the plaintiffs in error. These exceptions seem to be set as a drag-net, in the hope that something might be

caught therein from which the defendants hoped to derive benefit. They are, in fact, no more than a general exception to the whole charge, and, in my judgment, fail to meet the requirements of the law. The objections to the charge, however, are stated in the fourth and fifth assignments of error, and may be condensed as follows:

1. That the court submitted to the jury the question, whether the consideration of the draft or bill of exchange pleaded in set-off had failed.

2. That said court instructed the jury that they would be justified in finding that the consideration had failed, if they should find the facts in that behalf stated in the charge.

3. That the court submitted to the jury the question of knowledge by said defendants of the fraudulent acts or representations of Charles H. Hall in obtaining said draft, "even though they should find that said Charles H. Hall was guilty of making any fraudulent representations or doing any fraudulent acts."

4. That the court instructed the jury that if they found either of the issues enumerated in the charge, that the plaintiff would be entitled to recover the amount of the drafts declared on.

5. That the court instructed the jury as to the facts in the case, contrary to the statute in such case made and provided.

6. That the court instructed the jury as to the effect they might give to certain facts assumed by the court to have been proved by the evidence.

7. That the court instructed the jury that they might find certain matters of fact as to which there was no evidence, and submitted to them questions of fact as to which there was no evidence before the jury to warrant the court in submitting such questions, or the jury in finding the facts to exist.

These objections go to the whole charge, and cover the whole merits of the case. And the question now arises whether upon the record this court will examine into the correctness of the rulings of the court below. Error is not to be presumed. If it exists, the party complaining must make it appear. The errors assigned complain that the judge misapplied the law to the facts, and this court is asked to examine both the facts as proven and the law as charged, and determine the correctness of the instructions to the jury. But this the court cannot do, for the simple reason that it does not appear that all the facts are now before it. In the case of *Wiggins* vs. *Burkham*, 10 Wallace, 129, this court held that where the bill of exceptions does not purport to set out all the evidence given a case below, and it does not appear what other evidence, if any, was there given, this court will not reverse the judgment for an instruction whose correctness or want of it depends upon the state of the evidence, and Judge Swayne, delivering the opinion of the court, and after referring to certain facts, says: "Whether these facts were in evidence does not appear. We are asked to take judicial notice of them. This we cannot do, however well satisfied we may be upon the subject. They should have been proved by proper testimony. But error is not to be presumed. It must be affirmatively shown. The facts in question may have been proved, and this may have been the reason of the refusal of the court to instruct as asked by the defendants. The propriety of the refusal depended upon the state of the evidence. The terms of the instruction do not necessarily imply that there were not facts in proof bearing upon the subject, besides those of which the instruction was expressly predicated. * * * If these facts were not in proof the bill of exceptions, under the circumstances, should have so stated. It does not appear

from anything in the record that the court erred in refusing the instruction. The presumption is the other way." And in another place he adds: "The bill of exceptions does not purport to set out all of the evidence. What other evidence was given, if any, does not appear."

In the case of *Generes* vs. *Campbell*, 11 Wallace, 193, it is decided that when the bill of exceptions does not purport to set forth all the evidence on either of the subjects to which the exception relates, and the judgment states that it was rendered for "reasons orally assigned," and these are not found in the record, there is nothing on which error can be assigned, and the judgment must be affirmed. And the following authorities are to the same purport: Thus, in *Keep* vs. *Kelley*, 29 Ala., 322, it is held that when the bill of exceptions does not purport to set out all the evidence, it will be presumed that the evidence, if set out, would sustain the charge. In *School Com.* vs. *Goodwin*, 30 Ala., 242, the law is laid down thus: Where the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that a general charge was justified by the evidence. So, in *People* vs. *McKinney*, 10 Michigan, 54, it is decided that every part of a judge's charge must be presumed to be correct, and to be warranted by the evidence, so far as the bill of exceptions does not show to the contrary. So, in *Montgomery* vs. *Doe*, 4 Ind., 266, it is held that the bill of exceptions must show with sufficient certainty that it contains all the evidence submitted at the trial, or the court below will be presumed to have had evidence to sustain the judgment. To the same effect is *Bain* vs. *Wilson*, 10 Ohio, 14; *Trustees* vs. *Leffler*, 23 Ill., 90; and *Southern Ins. Co.* vs. *Holcombe*, 35 Ala., 327. And the bill of exceptions must be construed most strongly against

the party excepting. *Fireman's Ins. Co.* vs. *Crandall*, 33 Ala., 9.

Now in the case at bar, the bill of exceptions contains no language from which it can be inferred that it embraces all the testimony offered on the trial and submitted to the jury. It makes no pretense of purporting to contain all the testimony, and in this respect it is utterly insufficient. It embraces no such phrase as that the "foregoing being all the testimony offered by either party," or "no other or further testimony being offered," nor anything that is equivalent thereto, thus creating the legal inference or presumption that other evidence was introduced, and that the omitted testimony justified the charge of the judge to the jury. Without some such allegation, by which the appellate court can be satisfied that the whole case is before them, it cannot, either upon principle or in justice to the inferior tribunal, undertake to pass upon or revise its decisions.

I might, with perfect safety, rest this branch of the case here, but I prefer to go a step further. A careful perusal of the charge, even admitting that all the testimony offered on the trial is set forth in the bill of exceptions, does not make it appear to my mind that there is error in the instructions. The charge clearly covers the questions of fraud and failure of consideration, and these were the issues submitted to, and on trial before the jury, and it was clearly explained to them what constituted fraud under the circumstances. It was not a question whether the defendants below held the drafts pleaded in set-off as commercial paper, without notice of any defect in the title of Charles H. Hall, and for a valuable consideration, but it was whether the defendants had obtained the draft by fraudulent collusion with Charles H. Hall and others. This issue was clearly explained to the

jury, and they were told what constituted fraud under the circumstances. Thus the judge, after telling the jury that the burden of proof was upon the plaintiff below, that is, that he was bound to prove the fraud alleged, instructed them upon this issue of fraud, that "if you shall find from the evidence in the case, that there was an understanding or collusion between Charles H. Hall and the defendants, that Charles H. Hall should obtain said draft from the bank upon the faith and representations that the five thousand dollar draft of said Charles H. Hall on the defendants of the same date would be duly accepted, and collaterals put up to secure its payment, and that at the same time it was well understood between said Charles H. Hall and the defendants that said five thousand dollars would not be accepted, nor securities put up, then you will be justified in finding that issue for the plaintiff." This was the leading point of the charge on this issue of fraud, no other portions of the instructions conflicted with it, and it was warranted by the facts offered in evidence. As a legal proposition it cannot be successfully refuted, for it connected the defendants with the fraud of C. H. Hall anterior to their receipt of the $4,500 pleaded in set-off, and made them a party thereto, and if they received it with a knowledge of the fraud, they were not *bona fide* holders without notice, and held it subject to any defense which might be pleaded against the draft by the plaintiff or the bank he represented.

What, then, were the facts developed by the testimony to which this general instruction applied?

1. Charles H. Hall, a brother of one of the defendants, a grain dealer of Cedar Rapids, commences to do business with the First National Bank of that town, of which the plaintiff below is cashier, in February, 1868, and had a line of discount on that bank from that period up to No-

vember of the same year of from $5,000 to $7,000. He drew drafts on the defendants at Chicago, Ill., at sight and on time, which were accepted and paid from time to time as they matured.

2. In November, 1868, he applied to the bank for an increase of his line of discount, to enable him to buy pork and produce, which was assented to by the bank, and under the new arrangement he was to draw drafts on time on Sherman Hall & Pope and Sherman Hall & Lebrand, of which firms his brother was the leading member, payable in Chicago, against his produce shipped to them, which the bank was to discount and place to his credit, the money to be drawn out by him as he required it in his business of buying pork and grain. From this time up to February 20th or 25th C. H. Hall's discount ran up to $15,000, $20,000, or $25,000.

3. About February 20th or 25th, 1869, Weare, the plaintiff, representing the bank, required C. H. Hall to come back to his old basis of discount, viz: from $5,000 to $7,000, but Hall kept on drawing under the November arrangement till March, when Weare insisted that the line of discount should be reduced.

4. In a few days after this, C. H. Hall came to the bank and said he had a project with his brother and other associates to put in a bid for a Government contract for delivering a large amount of oats on the Missouri river to supply Indians and troops, and wanted to continue the loan he already had, and he then represented that he had about $15,000 worth of produce in store and in the country. This conversation resulted in an agreement that the bank would accommodate him, upon condition that he would arrange with the defendants that when they accepted his drafts in favor of the bank, they should put up collateral securities that they will pay, to

the satisfaction of Mr. Parsons, cashier of the Third National Bank, Chicago. Charles H. Hall kept on drawing and using the proceeds, and Weare insisted that the arrangement for collaterals should be carried out.

5. On the 11th and 12th of March, Charles H. Hall presented to the bank drafts to the amount of $13,000, one of which was for $10,000, which the bank discounted, and then Weare informed him: "Before we go any further, you must go into Chicago and arrange this matter of collaterals."

6. Weare and Hall reached Chicago on the 13th of March, and about 3 o'clock the two went to the office of Sherman Hall & Lebrand to see Sherman Hall. He was not there, and the two made an appointment to meet that evening at the Sherman House. Weare kept the appointment, and met there Charles H. Hall, but Sherman Hall did not make his appearance. Charles Hall said he had arranged the matter. Weare left Chicago on the 11 o'clock train for Cedar Rapids, Charles Hall saying he would remain and fix the matter up. This brings the time up to the night of the 13th of March, and the steps in the fraud now move on in rapid succession.

7. The drafts amounting to $13,000, drawn on defendants on the 11th and 12th of March, did not reach Chicago till the 15th, *at which time Charles H. Hall was in Chicago*, and these drafts were not protested for non-payment till the 18th of March, a fact that should be borne in mind.

8. On the 15th of March, while these drafts for $13,000 were lying in Chicago, unpaid and not protested for non-payment, Charles Hall and McAfee appeared at the office of Sherman Hall & Pope, and there the bill of sale to the latter was prepared. Sherman Hall & Pope were consulted, and both approved the sale. *Pope wrote the bill of*

sale, and Sherman Hall gave McAfee a written guaranty, in the name of the firm, that his brother Charles had in Cedar Rapids the quantity and value of the grain he represented. That night Charles Hall and McAfee left Chicago together.

9. The next morning, the 16th, Charles Hall and McAfee appeared in Marion, six miles from Cedar Rapids, where the bill of sale was atknowledged by Charles Hall, and where it was filed for record by McAfee. Here the note for $12,400, was signed by McAfee, payable to Charles Hall, who indorsed it in blank, and deposited it with Stevens, a banker, and here McAfee drew a draft on the defendants for $2,000, upon the payment of which McAfee's note was to be surrendered to Charles Hall. The draft was paid, and the note either given up to C. Hall or forwarded to defendants.

10. In the afternoon of the same day, the 16th, the two appeared together at the bank, where Charles Hall presented for discount a draft on defendants for $5,000, and stated that before he left Chicago the whole batch of the previous drafts had been accepted, and that he had a telegram from his brother, saying that the whole of the $13,000 had been accepted and collaterals put up. He was then asked how much grain he had, and he replied about 12,000 bushels of corn and wheat, and about 19,000 bushels of oats, making in all, he thought, about $20,000 to $21,000. McAfee was present and heard this conversation, and never disclosed to Weare that he had then a bill of sale of this very property in his possession. Upon this representation of Charles Hall's the bank discounted the $5,000 draft, and received the $4,500 pleaded in set-off.

11. About 4 o'clock of the same day the bank received a dispatch that the drafts for $13,000, on the defendants, were protested for non-acceptance, and thereupon Weare

telegraphed the Third National Bank of Chicago not to pay the draft of $4,500, pleaded in set-off, which Charles Hall received as a part of the discount on the $5,000 draft.

12. Weare then started in pursuit of Charles Hall; found that he had gone to Marion, where McAfee resided, but did not find him. There he learned for the first time of McAfee's purchase of the property of Charles Hall. Returning to Cedar Rapids, he there met C. Hall, and demanded the $4,500 draft he had obtained in the morning and the note of McAfee, both of which Charles Hall said that he had sent to defendants. Weare then insisted that Hall should go with him to Chicago that night, and arrange the matter with defendants. After some hesitation Hall consented, and that night the two went together to Chicago.

13. Weare and Charles Hall arrived in Chicago about noon of the 17th of March. At 2 o'clock Weare went to the office of defendants, where he found Sherman and Charles Hall in conversation. Sherman came forward to talk to him, admitted that Charles had a right to draw the drafts, and promised to fix the thing up. Weare left and returned again, at Sherman Hall's request, at 5 o'clock, when he found the two brothers again in conversation. To gain time was now evidently the object. Sherman Hall here said to Weare, "My partner has been out all day; have not talked this matter over much. You cannot go out to-night. These drafts need not be protested; need be no fears about them, and we will fix this thing up. You come in in the morning about 10 o'clock."

14. The next morning, the 18th, Weare went again to the office, and then Sherman Hall handed him a letter from Charles, written the night previous, saying that he

could not do any good by staying; would leave for Iowa that night; and they must arrange the business there. Weare then asked Sherman Hall if he intended to do as he agreed, to which he replied: "Yes, I am very much interested in my brother. Mr. Pope feels a little sensitive in some things. I desire to have everything satisfactory always, and I have concluded that you take these drafts with you. I will go out. We will look over Charles' matters. Sorry you have had this trouble, but I will fix it up in Iowa. I will meet you at the train." And that night Weare and Sherman Hall went on to Cedar Rapids, the former having had the $13,000 drafts protested on that day before leaving Chicago.

15. At this very time the defendants had in their possession McAfee's note of $12,400, indorsed by Charles Hall, and had paid the $2,000 draft of McAfee, so that they were the holders and owners of the note, and their books showed that Charles Hall had been credited with the amount of the note, which liquidated his indebtedness to defendants, and left a balance of $100 to his credit; and in order to make this credit, the entry had not been made regularly, nor transferred from any other book, *but* "*was entered in pencil, very soon after the 17th of March, obliquely across the page.*"

16. The scene is now transferred to Iowa. Weare and Sherman Hall arrived in Cedar Rapids on the morning of the 19th of March. They agreed to meet at Charles Hall's rooms about 10 o'clock. Weare saw Sherman Hall about that time, who said he had not seen his brother, and adjourned the meeting till 2 o'clock. In a few minutes after this Weare learned that Charles Hall had left for Council Bluffs, and had been gone since the night before. Thereupon Weare went in pursuit of Sherman Hall, and the interview is thus related by Weare: "Told

him he had been to his brother's room. Don't you know he is on his way to Council Bluffs? You have made appointment for 10 o'clock. I perhaps can excuse that, but the 2 o'clock appointment after you knew he had gone to Council Bluffs. This is the first time I have had occasion to say my confidence is shaken in you; that there is iniquity in you; that I am a dupe. He said, It matters very little what you think. *If you can beat me at my own game, why, then, I have nothing to say.*" And this was the culmination of the fraud, openly avowed by the leading man of the defendants. For two days he had delayed and temporized with the plaintiff, till he supposed his brother had had time to dispose of his property at Council Bluffs and get away, and then he boldly acknowledged it as his own game.

17. Charles Hall's purpose was to get to Council Bluffs and dispose of property he had in Omaha, valued at from $3,500 to $4,000, before it could be attached by the bank, for which purpose he left on a freight train, and he did sell it, after it was attached by the bank, for $1,500. At Council Bluffs Charles Hall was arrested and brought back to Cedar Rapids.

18. After Charles Hall was brought back, Weare proposed to Sherman Hall that if he would give up McAfee's note, and indorse Charles Hall's note in the firm name for the balance due the bank, some $12,000 or $15,000, the bank would give all the time they could reasonably ask, to which he replied: "The thing is a good deal mixed. I shall have to go home and consult Mr. Pope before I do anything more."

19. The bank then attached the property of Charles Hall, covered by the bill of sale to McAfee, who made no defense to the suit, from which the bank realized some-

thing over $4,000. On the whole transaction with these parties the bank lost from $21,000 to $25,000.

Now, here are the substantial facts, supported by minor circumstances not necessary to be detailed, which show the pertinency of the instructions given by the judge, and which lead the mind as forcibly and irresistibly to the conviction of fraud as any possible state of facts can do. It is a maxim as old as the law itself that "acts speak louder than words," and this case illustrates the truth of the maxim; and in the face of testimony establishing these facts, was it not altogether proper for the court to instruct the jury: "When men collude together to circumvent and defraud another they generally take the precaution to conceal or obscure their intentions, frequently by a show of fair dealings and apparent uprightness. Their actions, and the result of their actions, in such cases, are much more significant than what they say. What they do is altogether a far better index of their intentions than what they profess. Circumstances, as a general rule, are the only evidence by which fraud is established; and, therefore, while a jury should not be swift to assume fraud, as proven by a single suspicious circumstance, yet, when a series of coherent circumstances all combine to lead the mind to the same natural or legitimate conclusion that fraud has been perpetrated or intended, then the jury is not only justified in finding the allegation of fraud proven, but it is their duty to do so."

And, finally, after the judge had reviewed the case at some length, fully expounding the law as applicable to the testimony, that the jury might thoroughly understand the issues presented and to be determined, he recapitulated as follows:

14. "To recapitulate, then, the real questions at issue are not whether the consideration of this draft has failed

as against Charles H. Hall, or whether Charles H. Hall was guilty of fraud in obtaining it, but whether the defendants at the time they took the draft from Charles H. Hall knew the facts out of which the draft originated to such an extent as to vitiate it in their hands; were they parties to Charles H. Hall's fraud, or did they know of his agreement that they should accept and secure his draft, and that the draft in question was part of the proceeds of his draft; or had they such knowledge of the circumstances out of which the draft originated that they must be reasonably supposed to have understood the whole of the matter? If this knowledge is not brought home to them, even if the fraud or failure of consideration, so far as Charles H. Hall is concerned, is fully proven, yet the plaintiff has not made out a case. While on the contrary, if the proof or a preponderance of the proof satisfies you that the defendants did know that the consideration of the contract in question was an agreement that the defendants should accept and secure and pay the five thousand dollar draft of Charles H. Hall, and that the defendants have refused to accept, secure, or pay, then the plaintiff will be entitled to a verdict at your hands on the issue of failure of consideration."

15. "And if you find from the evidence that this draft was obtained by Charles H. Hall from the plaintiff by false and fraudulent representations that certain other drafts had been accepted by defendants and secured by collaterals, and also, after the amount of grain he, the said Charles H. Hall, then had in store in Cedar Rapids had been sold and disposed of by him, and that the said defendants knew at the time they received said draft that the said draft had been so fraudulently obtained, or if you shall believe from the evidence that said draft was thus fraudulently obtained by Charles H. Hall from the plaintiff in pursuance of a collusive and fraudulent conspiracy between the defendants and Charles H. Hall, with the express or implied understanding that the said five thousand dollar draft was not to be accepted, secured, nor paid, or as a part of the conspiracy between said Charles H. Hall and defendants, by which all the available property of said Charles H. Hall was to be trans-

ferred, directly or indirectly, to the defendants for the purpose of defrauding the plaintiff and his bank, then you will be authorized in finding the issues of fraud for the plaintiff."

Thus both the issues were brought home directly to the minds of the jurors. They were told that the plea of failure of consideration could not be sustained merely on the proof of fraud on the part of Charles H. Hall in obtaining the $4,500 draft, pleaded as a set-off, but that they must be satisfied from the evidence that the defendants, at *the time they took the draft*, knew the facts out of which the draft originated to such an extent as to vitiate it in their hands; or, in other words, that *they were parties* to the fraud of Charles H. Hall. And under the plea of fraud they were instructed that before they could render a verdict under it, they must find that the defendants knew *at the time* they received the draft that it had been fraudulently obtained by Charles H. Hall, or had been obtained by said Charles from the plaintiff, in pursuance of a collusive and fraudulent conspiracy between the defendants and said Charles. This is clearly the law; and if it was thus obtained the defendants were not *bona fide* holders of the draft, and they took it subject to the equities existing between the drawer and the payee; and this view fully covers and disposes of the point raised in the brief of the counsel for the plaintiff in error, that the drafts pleaded in set-off was commercial paper, and that a defense to the draft as between the bank and Charles H. Hall, arising *after* the defendants below had received the same, could not be set up against the draft in their hands. I concede that the law is, as it is pithily stated in *Davis* v. *McCreadey*, 4 E. D. Smith, 565, that "a third person, taking a bill or note before maturity, for value, with knowledge of the original consideration, *but without notice of any*

failure thereof, is entitled to recover." But the case at bar is not such a case, and if it were the instruction of the court substantially left it to the jury to determine whether the defendants below had such a notice. Under the plea of failure of consideration the jury were told that before they could find for the plaintiff they must be satisfied that the defendants, at the time they took the draft from Charles H. Hall, knew the facts out of which the drafts originated *to such an extent as to vitiate it in their hands*, or that they were parties to the fraud by which Charles H. Hall obtained the draft. And on the other hand, they were further instructed that even if the fraud or failure of consideration, so far as Charles was concerned, was fully proven, unless the knowledge of that fraud was brought home to defendants, the plaintiff had not made out a case, or, in other words, had failed to sustain his plea of failure of consideration.

Now, Charles H. Hall obtained the $4,500 draft of the bank by exchanging for it a $5,000 draft on defendants, with the promise and agreement of said Charles that defendants would or should deposit collaterals to secure the payment of that and other drafts with Mr. Parsons, of the Third National Bank of Chicago, and to his satisfaction. He presented or read a telegram from defendants, saying that the whole $13,000, the amount of previous drafts, had been accepted and collaterals put up, and on the strength of these representations obtained the discount of the $5,000. This was on the 16th of March, and three days before Weare and Charles Hall had gone to Chicago expressly to make this very arrangement about putting up collaterals and securing the drafts which Charles had drawn or might draw on defendants. While Weare was in Chicago Sherman Hall dodged him, or kept out of the way, and he returned to Cedar Rapids, leaving Charles H.

Hall to perfect the arrangement. It may be that up to this time there is no proof to connect Sherman Hall & Pope with Charles Hall's fraud, but their subsequent acts, after Weare left Chicago, on the night of the 13th, do show their participation in the fraud. What are those acts? Charles Hall remains in Chicago from the 13th till the night of the 15th of March. McAfee is either sent for or turns up in Chicago, and there the defendants, with Charles Hal , arrange for the purchase by McAfee of all of Charles Hall's property in Iowa. The defendants counsel and advise the sale. Pope draws the bill of sale, and the firm give a *written guaranty* that Charles Hall owns the property, in amount and value, that he represents, and which is described in the bill of sale. There is no proof that defendants had ever seen this property or had anything more than the mere word of Charles Hall as to its ownership. Why, then, give a written guaranty? In return for this bill of sale and written guaranty, McAfee executes a time note for $12,400 to Charles Hall, and the two latter leave Chicago on the night of the 15th, reaching Marion on the morning of the 16th of March. Here the bill of sale is acknowledged and filed for record, and McAfee draws on the defendants for $2,000, which draft is promptly paid, and the next day, or "about the 17th of March," in the language of the bill of exceptions, the note of McAfee, indorsed by Charles Hall, is in the hands of defendants, and Charles is credited with the amount on their books, thus paying his indebtedness to them, and leaving him a credit of $100. After this is done—after the defendants have secured the proceeds of Charles H. Hall's property, in the shape of the McAfee note, and his indebtedness to them is liquidated—after Charles H. Hall has obtained the discount of the $5,000, and mailed them a draft of $4,500 of the amount, dated

the 16th, and received by them on the morning of the 17th of March, the fraud is complete, and on that day they permit the drafts of March 11th and 12th to be protested for non-payment on the 18th, and thus the fraud is consummated. From these latter acts of the defendants, occurring between the 12th and 17th of March, it was left to the jury to determine whether they received the draft for $.,500, with such notice of the fraud of Charles Hall, at the time they received it, as vitiated it in their hands, or whether they received it in pursuance of a collusive and fraudulent conspiracy between them and said Hall. If they obtained the draft with notice of the false representations of Charles H. Hall, and knowing that those representations, the performance of which depended upon themselves, would not be carried out, they were not *bona fide* holders, and it was liable in their hands to the same defense that might have been pleaded if suit had been brought in the name of Charles H. Hall, the payee of the draft. If they were in the conspiracy with Charles H. Hall, and combined with him, then they were a party to the fraud, and were in no better situation. And receiving the draft under these circumstances, whether it was received by them, as alleged in the argument of counsel for plaintiffs on error, to enable them to pay the acceptance on which this suit was commenced, or to pay an acceptance thereafter to be drawn, the defendants received it wrongfully, and in fraud of the rights of the drawer, and whether they paid a consideration therefor is utterly immaterial. If the defendants were holders of this draft for value, they were also holders with a knowledge of, or as participants in, the fraud of Charles H. Hall, and took it affected with the fraud by which it was obtained.

This is really the only substantial point made in the argument of the counsel for the plaintiffs in error, and this is an *after thought*—an attempt to gain the case here, and

reverse the judgment below, upon a question not presented in the circuit court. An examination of the record will make it apparent that no instructions were requested of the court below by the attorneys for the defense, and, consequently, that they asked no instructions upon this point or any other. If they relied on this point, as they rely upon it here, the mind of the court should have been directed to it, and, if a proper instruction had been refused, the question could have been reviewed in this court. This having been done in the court below, we should have more faith in the *sincerity* with which the question is presented and argued here.

It is proper to say in this connection, upon the whole case, that it appears from the record that the pleadings and many of the original papers in the cause, previous to this trial, had been destroyed in the great Chicago fire; that the case had been previously tried, but whether the jury failed to agree or the verdict was set aside is not shown; that on this trial both the defendants and Charles H. Hall testified in their own behalf; that the trial seems to have been a full and fair one; and that the testimony necessarily was very conflicting. The jury were instructed that they were the sole judges of the credibility to be given to the witnesses and of the weight of their testimony, and that it was their duty, if possible, to reconcile the conflicting statements of the witnesses. The jury, after a patient consideration of the case, decided against the defendants, sustained the replications of failure of consideration and fraud, and rendered a verdict for the plaintiffs. Under these circumstances, a very plain case of error in the action of the court below—an error working an irreparable injury to the defendants, and which, if corrected, would be likely to produce a different verdict—should be made clear to the mind of this court to justify a reversal of the judgment. That no

such error will be found, and that the present effort of the plaintiffs in error is an appeal from the findings of the jury rather than from the rulings of the court below, will, I think, be apparent to this court from an examination of the whole record.

The eighth and ninth assignments of error go to the overruling by the circuit court of motions to set aside the verdict and for a new trial, and in arrest of judgment. As these do not appear to be urged in the argument of the counsel for the plaintiffs in error, I shall allude to them very briefly. The motion in arrest of judgment is based on the ground that the pleas of the defendants below, alleging a promise to pay the draft of $4,500, pleaded in set-off by the plaintiff, was not traversed by the replication. To this it is a sufficient answer to say that the plaintiff, in his replication, did not deny the execution of the bill of exchange pleaded as a set-off by the defendants. He admitted his liability upon the instrument, and confessed and avoided the pleas, by replying fraud and a failure of the consideration of the draft. By admitting his liability on the instrument, a promise to pay was implied by the law, and if he had specially denied the promise as alleged in the pleas, as a matter of form, no proof other than the draft would have been required to establish the liability of the plaintiff.

The motion to set aside the verdict and grant a new trial was a matter entirely within the discretion of the court below, and the refusal of the court to grant such a motion cannot be assigned as error in this court. Upon this point I need but refer the court to *Insurance Company* vs. *Barton*, 13 Wallace, 603, and cases there cited.

No error appearing in the record, the judgment below should be affirmed.

Respectfully submitted,

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Of Counsel for Defendant in Error.